(17,820.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 99.

JANE C. HITZ, APPELLANT,

vs.

JOHN STORY JENKS, WILLIAM HENRY JENKS, RACHEL JENKS RANDOLPH, SARAH L. CRANE, AND RICHARD W. TYLER.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

JANE C. HITZ, Appellant,
vs.
JOHN STORY JENKS ET AL. } No. 960.

a Supreme Court of the District of Columbia.

JANE C. HITZ
vs.
JOHN STORY JENKS ET AL. } No. 12800. Equity.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Original Bill.*

Filed November 6, 1890.

In the Supreme Court of the District of Columbia, November, 1890.

JANE C. HITZ, Complainant,
vs.
JOHN STORY JENKS, WILLIAM HENRY JENKS, Rachel Jenks Randolph, Sarah L. Crane, Richard W. Tyler, and Enoch Totten. } Equity. No. 12800, Doc. 31.

Bill of complaint of Jane C. Hitz against John Story Jenks, William Henry Jenks, Rachel Jenks Randolph, Sarah L. Crane, Richard W. Tyler, and Enoch Totten.

Jane C. Hitz, by this bill of complaint, respectfully shows to the court as follows:

1. She is a citizen of the United States and a resident of the city of Washington, and the defendants John Story Jenks, William Henry Jenks, and Rachel Jenks Randolph are citizens of the State of Pennsylvania and residents of the city of Philadelphia. They are sued as the children, sole heirs-at-law and devisees of William P. Jenks, late of the city of Philadelphia, now deceased. The said defendants, Richard W. Tyler, Sarah L. Crane, and Enoch Totten, reside in the city of Washington. The said Crane is sued as vendee in a certain deed hereinafter described, dated June 16, 1877; said

Tyler is sued as trustee named in a certain deed made by
2 Sarah L. Crane, dated June 18, 1877, and as receiver appointed by this court by a decree of the general term, dated December 11, 1883, and said Enoch Totten is sued as trustee in a deed made to him by said defendant, John Hitz, and this complainant, hereinafter set out.

2. The complainant was born in the city of Washington on the 28th day of March, 1837, and is now a married woman. On the 5th day of August, 1856, she was married to John Hitz, and five children were born to them, only two of whom are now living. Their child first born was Kate Joanna Hitz, who was born on the 9th day of June, 1857, and their youngest child was William Henry Hitz, who was born on the 21st day of April, 1872. Complainant's father was Michael Shanks, also a citizen of the United States and a resident of the city of Washington. He died in said city on the 20th day of May, 1864, intestate, leaving a widow, who died in 1879, and the complainant his only child and sole heir-at-law.

3. She inherited from her father at the time of his death, amongst other property, the following-described parcel of land, situated on the northeast corner of G and Ninth streets, in the said city of Washington, to wit, all of lot numbered three (3), in square numbered four hundred and five (405), and the west thirty (30) feet front, and running back with that width eighty-seven (87) feet in depth, of lot numbered two (2) of said square four hundred and five (405). Said land was and is improved by several large brick buildings, and she believes it is of the value of nearly, if not fully, two hundred thousand dollars ($200,000.00).

3 4. On or about the — day of January, 1872, her said husband and Charles E. Prentiss and others organized and set in operation an institution called "the German-American savings bank," in said city, which was subsequently regularly or irregularly converted into a national banking institution, and was called "the German-American national bank." Of this last-named institution her husband was president, and said Charles E. Prentiss was cashier. This alleged conversion took place on or about May 14, 1877, and said bank became insolvent October 30, 1878, and Benjamin U. Keyser was appointed receiver thereof. After the insolvency of said bank, she learned for the first time that an alleged deed was recorded amongst the land records of the District of Columbia, purporting to be a deed from said John Hitz and the complainant, bearing date June 16, 1877, and recorded June 20, 1877, in Liber 857, folio 409, which purported to convey to one Sarah L. Crane the above-described property, in fee simple, for the consideration of $40,000.00. A true copy of said deed is herewith filed, marked Exhibit A with bill, and is referred to as a part hereof. She avers that said deed was fraudulent as to her, and was wholly without consideration, and that it was either a forgery or she was procured to sign and acknowledge it, if she did sign and acknowledge it (which she does not in anywise admit), by means of the fraudulent concealment and imposition of her husband, said Prentiss, and other officers of the bank, in order to relieve the said bank of the

burden of certain fraudulent notes held by it and hereinafter described. The said Sarah L. Crane was the sister-in-law of Charles E. Prentiss, the said cashier of said bank,
4 and was in nowise interested in said property and did not then pay and never paid any consideration whatever for said property and never pretended or claimed to own the same or any part thereof or interest therein. Her name was used in the transaction merely to render the consummation of the fraud conceived and undertaken by the said Hitz and Prentiss more easy and convenient. As a further step in the said scheme of fraud against the complainant, said Crane was procured to and did at the time sign and acknowledge a deed to the defendant Richard W. Tyler, as trustee, whereby she undertook to convey the said property to said Tyler in trust to secure the payment of a promissory note dated about the 18th of June, 1877, for $20,000.00, made by the said Crane and payable to the order of the said John Hitz, and by him endorsed, to the said William P. Jenks, payable in three years from the date thereof, with interest thereon, at the rate of eight per centum per annum, until paid. Said deed bears date June 18, 1877, and was recorded on the 20th day of June, 1877, in Liber 857, folio 410, one of the land records of the District of Columbia. A true copy thereof is herewith filed, marked Exhibit B with bill, and is referred to as a part of this bill. The said Sarah L. Crane received no part of the said sum of $20,000, but the same was paid by the said Tyler to said Charles E. Prentiss, who applied it to the payment of two promissory notes, each for the sum of $10,000.00, held by said bank, made by one William R. Chipley, and dated on or about the 5th day of January, 1876, payable to the order of one E. P. Halstead. The said promissory notes were fraudulent and were procured by said John Hitz and Prentiss to cover up and conceal the financial condition of said bank and the true relations
5 between said John Hitz and said bank, and that said Chipley and Halstead were not indebted to said bank at the time and received neither money nor credit for said notes; they were merely "men of straw," financially irresponsible, and were used by said Hitz and Prentiss for the purpose of fraud and concealment.

The said Chipley notes appeared to have been secured by a deed of trust upon the same property purporting to have been made by complainant for that purpose, but she avers that said deed of trust was fraudulent as to her. It was a part of the scheme of said bank officers that the said last-named deed of trust should be, and it accordingly was, discharged by a formal release simultaneously with the making of the said Crane deeds.

Complainant does not know that the said William P. Jenks had any personal knowledge of the aforesaid frauds against and upon the complainant, but she alleges that the said Richard W. Tyler had knowledge thereof before he made the said loan for said Jenks or that he had sufficient information to put him upon inquiry, and that if he had made such inquiry diligently, as he ought to have done, he would have obtained full knowledge of the said fraudulent

acts and schemes of the said John Hitz. The said William P. Jenks was at the time of said conveyance a capitalist of great wealth, engaged in the business of lending money, and that the said Richard W. Tyler was his confidential agent and attorney in the city of Washington for the purpose of conducting such business in said city, and that said Tyler continued to be the agent and attorney of said Jenks until the time of the death of the
6 latter, which occurred some time in the *the* latter part of 1886.

5. She had no knowledge or suspicion of the making of the deed to Crane or of the making of the said deed by Crane to Tyler until after the affairs and property of the said national bank had passed into the hands of said Benjamin U. Keyser, receiver.

6. By a joint deed bearing date March 1, 1881, the said John Hitz and this complainant conveyed to defendant Enoch Totten, for valuable considerations therein expressed, all their right, title, interest, and estate in and to the said property hereinbefore mentioned in trust for the sole and separate use and benefit of the complainant. A true copy of said deed is herewith filed, marked Exhibit C with bill, which is referred to as a part hereof.

7. Soon after the appointment of the said Keyser as receiver of said insolvent bank and on the 10th day of January, 1879, he exhibited his bill in this court (being equity cause No. 6583) against the said William P. Jenks, the said Richard W. Tyler, the said John Hitz, this complainant, Sarah L. Crane, and others, by which he sought, amongst other things, to restrain the said Jenks and Tyler from consummating a threatened sale of the said property under the powers contained in the said deed of trust from Sarah L. Crane to said Tyler and to restore the said trust deed purporting to have been made to secure the payment of the said Chipley notes and to collect the said Chipley notes by a sale of the said ground. He
7 averred that the said notes were overdue and unpaid and that they were held by him as part of the assets of the said bank.

On this bill a restraining order was issued, enjoining said threatened sale; which restraining order was, on the 21st day of February, 1879, continued by an order of the special term of the court until the final hearing of the cause. Soon after the first order above mentioned was made and on or about the 1st day of December, 1878, the said Keyser, receiver, wrongfully and to the great injury of complainant, procured the said John Hitz, who was collecting the rents for complainant, to deliver to him, said Keyser, the possession of the property, and said Keyser wrongfully took possession thereof, as receiver of said bank, and collected and appropriated the rents thereof until on or about the — day of January, 1884, as hereinafter more fully stated, when he wrongfully delivered the said property into the possession of said Richard W. Tyler.

This complainant answered said bill, and also, on the 21st of October, 1879, filed a cross-bill charging, amongst other things, that the alleged deed of trust purporting to have been made by her and her husband to secure the payment of the said Chipley notes, as well as the said deed purporting to have been made by her and her

said husband to Sarah L. Crane, dated June 16, 1877, conveying said property to said Crane in fee, were both fraudulent and void, and praying, amongst other things, that both of said deeds, as well as the said trust deed from Crane to Tyler, might be declared null and void and be decreed to be cancelled. On the 13th of
8 November, 1880, she filed an amendment to her cross-bill, setting up additional reasons why said deed from her to said Crane should be set aside. Answers were filed by the various defendants, issues were made up on the pleadings, and testimony was taken at great length and filed in the cause.

Afterwards the cause was argued in the special term on the pleadings and proofs, and a decree was on the 28th day of November, 1881, passed in said cause, which decreed, amongst other things, that the said Richard W. Tyler be appointed receiver to take charge of and manage the said property and directing that said Benjamin U. Keyser, the complainant, who was then, as before stated, in possession of the property, to immediately surrender the same to the said Tyler; but this part of the decree was subsequently, on motion of the counsel for Keyser and on the 15th day of December, 1881, modified by a special order so as to permit said Keyser to continue in possession and to collect the rents of said premises, pending an appeal to the general term, on condition that he file his bond in the penal sum of $5,000.00, and that he bring in each month and deposit in the registry of the court the amount of money by him collected for rents. The said Keyser promptly filed said bond, and continued to collect said rents until January, 1884, in pursuance of the said authority of the court.

The complainant and the said William P. Jenks appealed to the general term from the said decision of the special term.

The cause was afterwards heard in the general term on said appeals, and a decree was passed therein on the 11th day of December,
1883, decreeing, amongst other things, that the complainant
9 in said cause, as the holder of the said Chipley notes, was not entitled to any relief whatever, and that the said deed of June 16, 1877, from this complainant and John Hitz to Sarah L. Crane, conveyed as well the right, title, interest, and estate of this complainant as of John Hitz in and to the real estate and premises in said deed mentioned and referred to, and that there was no equity shown in said cause to prevent or delay the execution and enforcement of the said deed of trust dated June 18, 1877, from said Sarah L. Crane to said Tyler.

Said decree contained the following provisions, to wit:

"Fourth. That the order passed in special term on the 15th of December, 1881, authorizing the collection of said rents and profits by the complainant, be, and the same hereby is, revoked, and that the said Richard W. Tyler be, and he is hereby, appointed receiver, with power until a sale shall be made under the said deed of trust to take and hold possession of said real estate and premises, and to rent and manage the same, and to collect the rents and profits and apply the same to the payment of the taxes, insurance, and any proper expenses; and it shall be the duty of the said receiver after

such application to pay from time to time the said rents and profits into court and from time to time to make report to the court of the manner in which he has discharged his trust, and before entering upon the performance of his office as receiver the said Richard W. Tyler shall give bond in the penal sum of five thousand dollars and with a surety or sureties to be approved by this court or one of the justices thereof, conditioned for the faithful discharge of the trust hereby reposed in him.

Fifth. That the said Jane C. Hitz pay to the parties entitled all costs incurred by and under the amendment of her cross-bill, filed on the 13th of November, 1880, so far as the rents and profits for which the complainant is required to account shall, without prejudice to the security of the said W. P. Jenks, be insufficient to pay such costs, and that the complainant pay to the parties entitled all the other costs in this cause.

Sixth. That the decree in special term, so far as the same is in any way inconsistent herewith, be, and the same is hereby, reversed.

Seventh. That this decree is without prejudice to the right of any party entitled to the reversion of the said real estate and premises or any interest in such reversion to redeem or to make claim, as such party may be advised, to any balance or portion thereof which, upon a sale under the said deed of trust and the satisfaction of the debt secured thereby, with interest and costs, and of the expenses of sale, may remain in the hands of the trustee.

Eighth. That, save so far as this cause is retained, as above mentioned and decreed, the bill of the complainant, with the amendment and supplement thereto, and the cross-bill of Jane C. Hitz, with the amendment thereto, be, and the same are hereby, dismissed."

The opinion of this court in general term was delivered by Mr. Justice James, and concludes as follows, to wit:

"We think, then, that the complainant has no interest in this property in respect of the Chipley notes; that the release of the original trust by Donaldson and Prentiss was valid; that the deed of Crane to complainant further to secure those notes must be cancelled; that the deed of Mrs. Hitz and her husband to Crane and the deed of Crane to Tyler in trust to secure Jenks are valid, and that the trustee in the latter should be allowed to proceed to execute his trust.

It may be that after payment of the note to Jenks by sale of the premises a surplus may remain to be disposed of. It is proper that the trustee be required, in case he makes sale and receives such surplus, to pay the latter into court. It appears also that a considerable amount of rents accruing from the premises has been collected and paid into court by the complainant. In the argument it was claimed on one hand that these sums should go to the creditors of Hitz. For the present we do not dispose of either question, and this cause will be retained, in order that the parties claiming to be interested may litigate their rights by proper further proceedings."

Thereupon this complainant, in open court, appealed to the Supreme Court of the United States, which appeal was duly allowed.

Afterwards and on the 31st day of December, 1883, this complainant presented to a justice of this court a supersedeas bond, in the usual form, with good and sufficient surety, in the penal sum
12 of $3,000, running to said William P. Jenks, with the condition thereto annexed that if she should fail to prosecute her said appeal to effect, then to answer to said Jenks for all damages and cost. Such *supersedeas* bond was on the said day approved in the words and figures following:

"Approved as a *supersedeas* bond this 31st day of December, A. D. 1883. Charles P. James, justice, &c."

The said bond was duly filed in this court on the said 31st day of December, 1883.

Complainant is advised by counsel, and therefore avers, that by force of this appeal and the approval and filing of this *supersedeas* bond and of the statute in such cases made and provided it became unlawful for said Keyser to deliver possession of said premises to any person or to surrender any right of the complainant, and this court had no authority to require him so to do or to make any order changing the receiver of the possession of said property.

Afterwards and on the 12th day of December, 1883, the day next after said decree of the general term, the said Tyler filed his bond as receiver under the terms of the said decree, and then, for the purpose of injuring this complainant, wrongfully procured the said Keyser to deliver to him possession of said property, and the said Keyser, wrongfully and improperly and notwithstanding his duty to hold possession of said property as receiver until ordered by the court to surrender it and notwithstanding the filing of said *supersedeas* bond on complainant's appeal to the Supreme Court and in violation of his own duty and her rights, did on the — day of January, 1884, deliver the whole of said premises into the pos-
13 session of the said Tyler and abandoned his authority over them. Such delivery was without the knowledge or consent of the complainant and was in violation of her rights in said cause and in said property. No special order of court, nor any order other than the said decree, was made discharging or relieving said Keyser from his duty as receiver under the said decree of the special term of December 15, 1881, appointing him receiver to collect the rents of said property, and no order to that effect could have been lawfully made by this court after the approval of said *supersedeas* bond. Said Tyler thereupon entered upon the possession of said premises and held or pretended to hold the same as receiver under the decree of the general term of December 11, 1883.

On the 31st day of March, 1885, the auditor of this court, in pursuance of an order to that effect, having stated the account of Benjamin U. Keyser, receiver as aforesaid, as to the rents collected by him, filed the same in the court in the said cause No. 6583, to which exceptions were duly filed by the complainant and others. Said cause again came on to be heard on said exceptions in the general term, and, argument having been heard, the court entered another final decree in said cause on the 13th day of July, 1885, directing the distribution of the rents collected by said Keyser and in part

overruled the said report of the auditor. The said decree, amongst other things, directs as follows, to wit:

"It is further ordered, adjudged, and decreed that the said money in the registry of the court, less the said costs, being $3,363.45, be paid by the clerk to Richard W. Tyler, receiver herein, to be by him receipted for and forthwith paid and applied towards the satisfaction of all the taxes and assessments and interest thereon
14 mentioned in 'Schedule C' of said report of the auditor, for which application and payment he shall be allowed credit in his account as receiver.

And further that this cause be, and the same is hereby, referred to the auditor of this court to state the account of the said receiver."

From this last decree the complainant appealed in open court to the Supreme Court of the United States, but the said decree was on said appeal affirmed, and the mandate from said court was filed in this court on February 11, 1889.

In pursuance of the said decree of the general term of July 13, 1885, the said Tyler filed his report as receiver, on the 31st day of July, 1885, showing that he had collected rents to the amount of $4,513.41. The auditor of this court made a report stating the account of said receiver and distributing this fund, but no order was ever passed affirming such report.

No order or decree has ever been made by this court discharging said Tyler as such receiver, or relieving him of the possession of said property, and she charges that he is liable and ought to be made to account for the rents and profits as well as for the possession of said property.

The said first-mentioned appeal of the complainant was regularly docketed in said Supreme Court of the United States and was afterwards argued and determined and the said decree of this court was by said Supreme Court affirmed. Afterwards and on or about the 11th day of February, 1889, the mandate of said Supreme Court was issued in said cause, and on that day, the 11th day of February, 1889, and not sooner, was presented to this court and was filed and
15 entered of record, but the question as to how the costs shall be apportioned between the several parties has not yet been finally adjusted, but is still pending.

8. Notwithstanding that the property was in possession of the court by its receiver, the approval and filing of the said *supersedeas* bond by the complainant, the opinion of the court saying that the cause should be "retained," and notwithstanding the complicated questions of law and fact, the great number of parties, the gravity of the charges of conspiracy and fraud contained in the pleadings and testimony, and notwithstanding the uncertainty of the result of the litigation in the Supreme Court of the United States and the fact that he was himself the receiver so in possession of the premises, the said Tyler, pretending to act as the trustee named in the said trust deed from Crane to him, did, on or about the 3rd day of March, 1884, unlawfully publish a notice in the Evening Star, a newspaper published in the city of Washington, that he would sell the said property at public auction, for cash, on the 26th day of

March, 1884, in front of the premises. Said advertisement was in the words and figures following:

"Thos. J. Fisher & Co., real-estate auctioneers.

Trustee's Sale of Valuable Real Estate, Fronting 100 *Feet on G Street and* 80 *Feet on Ninth Street Northwest, Improved by Two-story Brick Building Occupied for Business Purposes and Two Three-story and Attic Brick Dwellings.*

16 By virtue of a deed of trust dated June 18, A. D. 1877, and recorded in Liber No. 857, folio 411 *et seq.*, of the land records of the District of Columbia, and at the request of the party secured thereby, I will offer for sale for cash, at public auction, in front of the premises, on Wednesday, March twenty-sixth, 1884, at half past four o'clock p. m., all of lot numbered three (3) and the west thirty (30) feet front, and running back with that width eighty-seven (87) feet in depth, of lot numbered two (2), all in square numbered four hundred and five (405), as the same are known and described upon the plat or plan of Washington city, in said District, together with the improvements thereon.

A deposit of $500 will be required at time of sale. All conveyancing at cost of purchaser, and deposit to be forfeited if the terms of sale are not complied with within ten days from date of sale.

RICHARD W. TYLER, *Trustee.*"

mh3,5,8,10,12,15,17,19,22,24,26.

Soon after this advertisement appeared counsel for the complainant sent the following letter to the hands of the said Tyler, to wit:

B. U. KEYSER, Receiver, &c.,
vs.
JANE C. HITZ, WM. P. JENKS, ET AL. } Equity. 6583.

WASHINGTON, *Mar.* 10, '84.

"R. W. Tyler, Esq., receiver, &c.:

My attention has been invited to the advertisement published by you of a contemplated sale of the property involved in the above-entitled cause on the 26th of March, 1884.

A *supersedeas* bond was presented, approved, and filed in this cause, on the appeal of Jane C. Hitz, as long ago as last December, 1883.

17 Thinking that you might have overlooked this bond, I take the liberty of inviting your attention thereto.

Very truly, ENOCH TOTTEN,
Att'y for Jane C. Hitz."

The said property was at that time improved by two three-story brick dwelling-houses and one large two-story brick building, used for dwellings and retail shops, and was worth between $50,000.00 and $60,000.00. Complainant submits to this court that to undertake to make a forced sale of property so valuable *for all cash*

amounted to a breach of duty on the part of the trustee making the sale and to a great wrong to the complainant, the owner of the equity, and was so unreasonable as to amount to a fraud. The bidders at said sale were necessarily limited to those who were able to hold large sums of money in hand. The complainant charges that such sale was intended and was so conducted by those in charge of it as to amount to an attempt to cheat and defraud this complainant out of her equity of redemption in said property.

The complainant further charges that when the day and hour of sale arrived, as specified in said advertisement, there were only a few persons present, and not more than one or two, if so many, who could comply with the harsh terms of sale aforesaid prescribed by the trustee; furthermore, it was given out and stated at the time of the sale, and it was well known among the bystanders, that the property was involved in serious and protracted litigation; that whoever should buy the property would buy an expensive and tedious lawsuit. The bystanders and those who might have wished to bid were led to believe that the sale was being made in
18 this extraordinary situation of affairs only for the purpose of transferring the title to the holder and owner of the encumbrance mentioned in the advertisement. She further charges that no *bona fide* bids were made at said sale, and the property was knocked off to one Seth Caldwell, Jr., of Philadelphia, who was the attorney and special agent in the matter for said William P. Jenks, and for the sole benefit of said William P. Jenks and at and for the sum of $29,200.00 and not more. The complainant charges and submits to the court that this sum was very little, if any, more than half the value of the property and was grossly inadequate, and that a sale at and for such a sum was fraudulent. Afterwards the said Tyler, as trustee, made and delivered a deed to said Caldwell, bearing date on the 27th day of March, 1884, whereby he undertook to convey said property to said Caldwell in pursuance of the powers granted to him in and by said deed from Sarah L. Crane to him. Said deed to said Caldwell was recorded March 27, 1884, in Liber 1073, folio 323, of the land records of the District of Columbia. The said Seth Caldwell, Jr., a few days after the conveyance to him by Tyler, conveyed the said property to William P. Jenks, by a deed dated April 9, 1884, which last-mentioned deed was recorded December 17, 1884, in Liber 1107, folio 60.

She further charges that the said Tyler, who made said sale, as trustee, was at the time thereof and had been ever since May, 1887, if not earlier, the confidential agent of said Jenks to attend to his business in Washington; that said Tyler negotiated and consummated said loan of $20,000 to John Hitz, which was secured by said Crane deed of trust; that he was from that time and continued to be until the time of the death of said Jenks his agent and
19 attorney in reference to said loan and said property, and that he still represents the heirs of said Jenks, and now pretends to be in possession and charge of said property for them and not as the receiver of this court. He has had possession of said property ever since he procured the same from said Keyser, as hereinbefore

stated. No actual change of possession took place after said pretended sale.

9. The said William P. Jenks departed this life, testate, in Philadelphia on the — day of October, 1886. By his last will and testament, duly probated on or about the 5th day of December, 1886, he devised all his estate, real and personal, except a few small legacies payable in money, to said three children, John Story Jenks, William Henry Jenks, and Rachel Jenks Randolph.

10. The complainant further shows to the court that ever since the said national bank closed its doors she has been involved in protracted and expensive litigation. The suit hereinbefore mentioned (being equity cause numbered 6583 in this court) has not been finally closed, and her anxiety and her expenses therein have been very great. She was in 1878 also sued by said Keyser on account of her alleged statutory liability as the owner and holder of $20,000.00 of the stock of said national bank, which said stock she avers was fraudulently and without her knowledge or consent put in her name on the books of said bank by her said husband. Said action has been twice tried, each time before a jury, and it has been twice argued on appeal in the general term and has once been heard in the Supreme Court of the United States. It is now
20 in this court awaiting a third trial by a jury, and the said claim now amounts to about $32,000.00. The said litigation has been both harassing and expensive, and she has been obliged to be very economical because of the embar-assed condition of her estate. For these reasons she has been compelled to delay the bringing of this bill until the present time.

The said pretended sale of her property ought to be set aside because:

1. The property was in the possession and custody of a receiver appointed by the court to take and keep possession thereof and to collect the rents, and an approved *supersedeas* bond in due form of law had been given on her appeal to the Supreme Court of the United States from the decree of the general term, and all proceedings were stopped, and no action could be legally taken under said decree while said appeal remained pending.

2. Said sale was void because the terms of sale were unreasonable; because there were no bids, the bidders there, if any, having been discouraged from bidding; because the pretended sale was made pending an appeal in the cause to the Supreme Court of the United States; because it was given out, stated, and understood at the time of sale that it was intended to make the sale in the face of said appeal for the purpose only of transferring the title to the creditors; because the price bid and accepted at said sale was so grossly inadequate as to amount to a fraud upon the complainant, and because said pretended sale was conceived and carried through solely in the interest of the creditor- and in total disregard and in violation of the rights of the complainant as the owner of the equity of redemption.

She therefore submits to the court that said pretended sale
21 should be set aside, and that she ought to be allowed to redeem said property. She is willing and hereby offers to pay

for the said heirs-at-law of said Jenks whatsoever sum may be found justly due to them for principal and interest on the said loan, and also for all expenditures in and upon said property, after charging them with the rents actually received, a fair accounting to be had under the direction of this court to ascertain the true balance due.

Prayers.

The complainant therefore prays as follows:

1. That the writ of subpœna in the usual form may issue out of the clerk's office, directed to the said John Story Jenks, William Henry Jenks, Rachel Jenks Randolph, Sarah L. Crane, Richard W. Tyler, and Enoch Totten, directing them and each of them to appear and answer the exigencies of this bill upon their respective corporal oaths.

2. That she may be decreed to be the owner of the said property subject to the debt due to the estate of the said William B. Jenks, notwithstanding the deed to Sarah L. Crane, dated June 16, 1877.

3. That said deed made by said Richard W. Tyler, trustee, to the said Seth Caldwell, Jr., dated March 27, 1884, and recorded in Liber 1073, at folio 323, be decreed to be set aside and cancelled, and that the record thereof be declared to be null, and that the said deed made by said Seth Caldwell, Jr., bearing date April 9, 1884, to said William P. Jenks, and recorded in Liber 1107, at folio 60, be decreed to be set aside, and that the record thereof be declared to be null.

22 4. That said pretended sale made by said Tyler to said Seth Caldwell, Jr., may be set aside and declared null and void, and that she may be allowed to redeem said property by paying to the heirs of said Jenks what may be found to be due on an account stated in reference to said property.

5. That the said Richard W. Tyler may be held to be chargeable as receiver of the said property, and that he be compelled to account for as well the rents he has collected as for the rents he should have collected, and that he be punished for a contempt of this court in abusing his authority and power and violating his duty as an officer of this court in attempting to sell property placed in his custody as receiver to be cared for and managed by him in behalf of this court and the parties interested.

6. That an injunction may be issued, directed to the said John Story Jenks, William Henry Jenks, and Rachel Jenks Randolph, restraining them and each of them from selling, conveying, or encumbering the said property, and that a receiver be appointed by the order or decree of this court to take charge of said property and collect the rents thereof and to take charge of the same.

7. That she may have such other and further relief as may be equitable and just and as her cause may require.

JANE C. HITZ.

ENOCH TOTTEN,
Sol'r for Complainant.

23 DISTRICT OF COLUMBIA, } ss:
County of Washington, }

Jane C. Hitz, being by me first duly sworn, did depose and say that she is the complainant in the above cause, and that she has heard read the foregoing bill of complaint and knows the contents thereof, and that she believes the averments therein to be true.

JANE C. HITZ.

Subscribed and sworn to before me this sixth day of November, A. D. 1890.

HARVEY S. W. DE GAW.
Notary Public, D. C.

[SEAL.]

EXHIBIT "A" TO BILL.

Filed November 6, 1890.

Lib. 857, fol. 409.

Jane C. Hitz *et vir* to Sarah E. Crane. } Recorded June 20, 1877. Deed.

This indenture made this sixteenth (16) day of June, in the year of our Lord one thousand eight hundred and seventy-seven, between Jane C. Hitz of Washington, D. C., and John Hitz her husband of the said city of Washington, D. C., of the first part and Sarah L. Crane of the city of Washington District of Colum-
24 bia, of the second part.

Witnesseth: that the said parties of the first part, for and in consideration of the sum of forty thousand ($40,000) dollars, current money of the United States, to her in hand paid by the said party of the second part, the receipt of which before the ensealing and delivery of these presents is hereby acknowledged, have granted, bargained, and sold, aliened, conveyed, and confirmed, and by these presents do grant bargain and sell, alien, convey, enfeoff and confirm unto and to the use of the said party of the second part her heirs and assigns, forever, all those certain pieces or parcels of land and premises situate and being in the city of Washington, District of Columbia and known and distinguished as being, all of lot numbered three (3) and the west thirty (30) feet front by a depth of eighty-seven (87) feet of lot numbered two (2) in square numbered four hundred and five (405), together with the rights, easements, privileges, and appurtenances to the same belonging or in anywise thereto appertaining.

To have and to hold the said land and premises, with the appurtenances and hereditaments to the same belonging unto and to the only use and benefit of said party of the second part, her heirs and assigns forever. And the said parties of the first part, their heirs, executors, and administrators do hereby covenant with the said party of the second part, her heirs and assigns, that the said hereinbefore-described land and premises, with the appurtenances, unto

said party of the second part, her heirs and assigns, from and against all persons claiming by, through, or under said parties of the first part or their heirs or assigns, the said parties of the first part and their heirs shall and will warrant and defend by
25 these presents. And, further, that any act or deed deemed by counsel learned in the law requisite and necessary the more perfectly to assure unto said party of the second part, her heirs and assigns the said land and premises hereinbefore granted the said parties of the first part and their heirs shall and will at all times, at the cost of the persons requesting the same, do, perform, execute and deliver.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JANE C. HITZ. [SEAL.]
JOHN HITZ. [SEAL.]

DISTRICT OF COLUMBIA, *To wit:*

I, S. F. Austin, a notary public in and for the county and District aforesaid, do hereby certify that Jane C. Hitz, of Washington, District of Columbia, party to a certain deed, bearing date on the sixteenth (16) day of June, A. D. 1877, and hereto annexed, personally appeared before me in the District aforesaid, the said Jane C. Hitz being personally well known to me to be the person who executed the said deed, and acknowledged the same to be her act and deed; and the said Jane C. Hitz, being by me examined privily and apart from her husband and having the deed aforesaid fully explained to her by me, acknowledged the same to be her act and deed and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

26 Given under my hand and official seal this 18th, eighteenth, day of June, A. D. 1877.

S. F. AUSTIN,
Notary Public.

[SEAL.]

DISTRICT OF COLUMBIA, *ss:*

I, S. F. Austin, a notary public in and for the District and county aforesaid, do hereby certify that John Hitz, of Washington, D. C., party to a certain deed bearing date on the sixteenth day of June, A. D. 1877, and hereto annexed, personally appeared before me in the county aforesaid, and the said John Hitz being personally well known to me to be the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under my hand and notarial seal this twentieth day of June, A. D. 1877.

S. F. AUSTIN,
Notary Public.

[NOTARIAL SEAL.]

Endorsed: This is to certify that the within is a true and verified copy of a deed as recorded in Liber No. 857, folio 409 *et seq.*, one of the land records for the District of Columbia. Washington, D. C., Jan'y 7, 1879. Geo. A. Sheridan, recorder.

27 EXHIBIT "B."

Filed November 6, 1890.

Lib. 857, folio 411.

Sarah L. Crane to R. W. Tyler. } Recorded June 20th, 1877, 2.20. Trust.

This indenture made this eighteenth day of June in the year of our Lord one thousand eight hundred and seventy-seven, between Sarah L. Crane, of the city of Washington, District of Columbia, party of the first part, and R. W. Tyler, trustee, of the same place, party of the second part witnesseth, that the said Sarah L. Crane, for and in consideration of the sum of ten dollars current money of the United States to her in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, before the ensealing and delivery of these presents has granted, bargained, sold, aliened, conveyed, and confirmed and by these presents does grant, bargain and sell, alien, enfeoff, convey and confirm unto and to the use of the said R. W. Tyler, his heirs and assigns, all those certain pieces and parcels of land and premises situate and being in the city of Washington, District of Columbia, and known and distinguished as lot numbered three (3) and the west thirty (30) feet front and running back with that width eighty-seven (87) feet in depth of lot numbered two (2) all in square numbered four hundred and five (405) as the same are known and described upon the plat or plan of said city, together with the rights, easements, privileges and appurtenances to the same belonging or in any-

28 wise thereunto appertaining;

To have and to hold the said land and premises with the appurtenances and hereditaments to the same belonging, unto and to the only use and benefit of said R. W. Tyler, his heirs and assigns. In and upon the trusts, nevertheless, hereinafter expressed and specified of and concerning the same, and to and for no other use, intent, or purpose, that is to say: First, to secure the full and punctual payment of one promissory note of even date with these presents for the sum of twenty thousand dollars ($20,000) signed by the said Sarah L. Crane and made payable to the order of John Hitz and by him endorsed to the order of W. P. Jenks, of Philadelphia, Penna., with waiver of notice and protest, the said note being payable in three years from date, with interest at eight per cent. per annum until paid, interest payable quarterly (being for money loaned by the said W. P. Jenks to the said Sarah L. Crane), and also to secure the payment on demand of any and all sums of money which during the continuance of this trust may be advanced by the holder of said note in keeping and preserving a "fire insurance" upon the buildings on said above-granted premises to the extent of at least twenty thousand dollars or in payment and discharge of any taxes or assessments, general or special, now

charged or assessed against, or which may hereafter and during the continuance of this trust be charged, levied, or assessed, against said premises, with interest on such sum or sums so advanced at the rate of eight per centum per annum from the date of such advance, and until default is made in the payment of said note, or any one quarterly instalment of interest thereon, or in payment on demand of any sum or sums advanced in payment of taxes or insurance as aforesaid or interest
29 thereon as aforesaid, to suffer and permit the said Sarah L. Crane, her heirs and assigns, the said above-granted premises, with the appurtenances, to hold, possess and occupy and the issues and profits thereof to receive to her and their own use; and upon full payment of said notes and sums of money and all interest and costs thereon, and all proper costs of this trust, to release and reconvey to said Sarah L. Crane her heirs or assigns, at his, or their cost and expense, the said above-granted land and premises. Secondly, upon default being made in the payment of said note or any quarterly instalment of interest thereon at the rate aforesaid, or any sum or sums advanced or expended for taxes and insurance as aforesaid, with interest as aforesaid, when demanded, or any cost, charge, or half commission, incurred or accruing of and concerning this trust, to sell said above granted and described land and premises or as much thereof as may be necessary with the appurtenances, at public auction to the highest bidder, upon such terms and at such time and place as to the said trustee shall seem most for the interest of all parties concerned, of all which public notice shall be given by advertisement inserted in one or more newspapers printed and published in the city of Washington, District of Columbia, three times a week for at least three successive weeks, and any sale under this trust may be repeated or postponed from time to time as to the said trustees or trustee acting shall seem most for the interest of all parties concerned and upon such sale being made and full compliance with the terms thereof by the purchaser or purchasers, all the
30 right, title, interest and estate legal and equitable, whether in possession, remainder or reversion of said Sarah L. Crane and her heirs in and to the land and premises sold, shall thereafter cease, determine and be forever foreclosed: And the said party of the second part or his heirs shall convey to such purchaser or purchasers, his, her, or their heirs or assigns, the said land and premises so sold with the appurtenances, in fee-simple, free from all liability on the part of such purchaser to see to or account for due application of the purchase-money and out of the proceeds of any such sale or sales the said trustee after retaining a commission of three per cent. on the gross amount thereof for executing this trust, shall pay, first, the proper expenses attending such sale or sales, and all money advanced or paid for insurance as aforesaid, or in payment of taxes as aforesaid; with interest thereon at the rate aforesaid; secondly, whatever may remain unpaid of said note, whether due or not, with interest thereon, at the rate aforesaid to the date of payment; and, lastly, the surplus, if any, shall be paid, over to said Sarah L. Crane, her executors, administrators and assigns.

In testimony whereof the said Sarah L. Crane has hereunto set her hand and seal the day and year first above written.

S. L. CRANE. [SEAL.]

DISTRICT OF COLUMBIA, *County of Washington,* } *To wit:*

I, S. F. Austin, a notary public in and for the District and county aforesaid, do hereby certify that Sarah L. Crane, party to a
31 certain deed bearing date on the eighteenth day of June, A. D. 1877, and hereto annexed, personally appeared before me, in the District aforesaid, the said Sarah L. Crane being personally well known to me to be the person who executed the said deed, and acknowledged it to be her act and deed.

Given under my hand and notarial seal this twentieth day of June, A. D. 1877.

S. F. AUSTIN,
Notary Public.

[NOTARIAL SEAL.]

Endorsed: This is to certify that the within is a true and verified copy of a deed recorded in Liber No. 857, folio 411 *et seq.*, one of the land records for the District of Columbia. Washington, D. C., January 7, 1879. Geo. A. Sheridan, recorder.

32 EXHIBIT "C."

Filed November 6, 1890.

Copy.

Deed in Trust.

John Hitz *et ux.* }
to
Enoch Totten, Tr. }

Recorded March 9, 1881, 3.10 p. m., Liber No. 963, folio 143 *et seq.*

This indenture, made this first day of March, in the year of our Lord one thousand eight hundred and eighty-one, between John Hitz and Jane C. Hitz his wife, of the first part, and Enoch Totten, trustee, party of the second part, all of the District of Columbia, witnesseth:

That for and in consideration of certain conveyances heretofore made and delivered and hereafter to be made and delivered, and in consideration of other valuable considerations had and received by the said John Hitz before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, said parties of the first part have granted, bargained, sold and conveyed, and do by these presents grant, bargain, sell, and convey, unto the said party of the second part, his heirs and assigns, all their right, title, interest, and estate of, in and to those several pieces and parcels of ground situated and lying in the city of Washington, in the District afore-

said, described as follows, viz: all of lot numbered three (3) and the west thirty (30) feet front, and running back with that width eighty-seven (87) feet in depth, of lot numbered two (2), in square numbered four hundred and five (405), as the same are known and described upon the plat or plan of said city of Washington; and also, of, in, and to all the pieces and
33 parcels of land, of whatsoever kind or description and wheresoever situated, of which Michael Shanks died seized, and which they have not heretofore lawfully conveyed, together with the improvements and appurtenances to all said granted premises belonging or appertaining; to have and to hold the same unto and for the only use and behoof of the said party of the second part, his heirs and assigns, forever, in trust, nevertheless, for the sole (and) separate use and benefit of the said Jane C. Hitz for and during the term of her natural life, free from the control of her husband and from any liability for his debts, and to permit her to have the possession, use and income of said premises, and further to lease, sell, mortgage, convey, and otherwise dispose of such premises, or any part thereof, in such manner and for such interests and estates as she may direct and appoint by her instrument of writing under her hand and seal and attested by two witnesses, and whether such direction and appointment be of a testamentary character, to go into effect after her death, or otherwise, and in remainder after her death, in the absence of any such direction and appointment or subject thereto, to hold the said premises for the use of the children of said Jane C. Hitz living at the time of her death and the children of any deceased children, so that the latter shall take the same share in said property which their parents would take if living, their heirs and assigns, forever.

I- testimony whereof the said parties of the first part have hereunto set their hands and seals on the day and year first
34 hereinbefore written.

JANE C. HITZ. [SEAL.]
JOHN HITZ. [SEAL.]

Signed, sealed, and delivered in the presence of—
HUGH T. TAGGART.

(Certificate as to acknowledgment omitted from this copy.)

Separate Answer of Enoch Totten.

Filed March 31, 1891.

In the Supreme Court of the District of Columbia.

JANE C. HITZ
vs.
JOHN STORY JENKS ET ALS. } Equity. No. 12800.

The separate answer of Enoch Totten to the bill of complaint of the above-named complainant respectfully shows to the court as follows, to wit:

He admits the truth of the averments contained in the said bill of complaint and consents to the relief prayed for therein.

ENOCH TOTTEN.

DISTRICT OF COLUMBIA, *County of Washington,* } *ss:*

Enoch Totten, being first duly sworn, doth depose and on his oath say that he is one of the defendants named in the above-entitled cause, and that he has read the foregoing answer by him subscribed and knows the contents thereof, and that the same is true.

ENOCH TOTTEN.

35 Subscribed and sworn to before me this 31st day of March, A. D. 1891.

R. J. MEIGS, *Clerk,*
By M. A. CLANCY, *Ass't Clerk.*

Joint and Several Answers of John Story Jenks et al.

Filed June 1, 1891.

In the Supreme Court of the District of Columbia. In Equity.

JANE C. HITZ, Complainant,
vs.
JOHN STORY JENKS, WILLIAM HENRY JENKS, Rachel Jenks Randolph, Sarah L. Crane, Richard W. Tyler, and Enoch Totten, Defendants. } No. 12800, Doc. 31.

The joint and several answers of John Story Jenks, William Henry Jenks, and Rachel Story Jenks Randolph, defendants, to the bill of complaint of Jane C. Hitz.

These defendants, reserving to themselves all right of exception to the said bill of complaint, for answer thereto say*s*:

1. They admit the allegations of the first paragraph of the bill.

2. They believe and admit that the complainant is the daughter of Michael Shanks, now deceased, late of the city of Washington, in this District, and that many years ago she intermarried
36 with John Hitz, who is now living, and hence that she was a married woman at and before the filing of the bill. They aver on information and belief that for the past ten years and upwards she has lived separate and apart from her said husband, and that she is educated, conversant with business affairs, and entirely capable of the management with skill and ability of her estate and business, and was so at and before and since the time when she voluntarily elected to live separate and apart from her said husband. As to the allegations of the second paragraph not answered and as to the particulars of all the allegations of the said paragraph, these defendants have no knowledge or information and do not admit the same.

3. They admit that the complainant inherited from her said father the alleged parcel of land. They admit that the said land is improved, but the buildings are not large, and, on the contrary, small and old, giving no additional value to the land. They deny that the value of the land and improvements is as alleged.

4. These defendants on information and belief say that on or about the 14th of May, 1877, an institution called the German-American savings bank, then and theretofore engaged in the business of banking in the city of Washington, was, in pursuance of the laws of the United States, converted into a national bank called the German-American national bank. The said national bank became insolvent on or about the 30th of October, 1878, and
37 Benjamin U. Keyser was duly appointed receiver thereof by the Comptroller of the Currency. Among the assets of the said German-American savings bank to which the said national bank succeeded were two notes dated January 5, 1876, and made by William R. Chipley, each note being for the sum of ten thousand dollars. These notes were secured by the deed of trust upon the property mentioned in the third paragraph of the bill, made by the said John Hitz and the complainant, his wife, on the 26th of January, 1876, to R. B. Donaldson and C. E. Prentiss, trustees.

On the 16th of June, 1877, the said John Hitz and the complainant, his wife, by a deed of that date, duly executed, acknowledged, and recorded, a copy whereof is filed with the bill, conveyed the said property to Sarah L. Crane in fee-simple for the consideration of $40,000, as declared by the deed.

On or about the 20th of June, 1877, William P. Jenks, the father of these defendants, in good faith and without notice, direct or indirect, of any defect or infirmity in the said deeds or either of them, loaned upon the said property the sum of twenty thousand dollars, it being part of the transaction that by means of the said loan the said Chipley notes should be paid and the said deed of trust to Donaldson and Prentiss, trustees, to secure the same, should be released, and thereby the deed of trust to be given to secure the said loan made by him should become the first lien upon the said property. Said loan was accordingly so applied and the said deed of trust released, and to secure the said loan the deed of trust from Sarah L. Crane to Richard W. Tyler, a copy whereof is filed with the bill, was duly executed, acknowledged, and delivered to
38 the said William P. Jenks or his agent and by him recorded.

Notwithstanding the said national bank had the benefit of the loan made by the said William P. Jenks, the said receiver, either through ignorance or fraud, on or about the 10th of January, 1879, filed his bill in this court against the said William P. Jenks, Richard W. Tyler, the complainant, Sarah L. Crane, and others, claiming that the said Chipley notes had not been paid, and that the said deed of trust to Donaldson and Prentiss, released as aforesaid, was illegally released, and should be reinstated as the first lien upon the said property, and praying, among other things, that the sale of the said property by the said Richard W. Tyler, trustee, who had then advertised the same for sale on default in the payment of

interest, should be enjoined. A reinstating order and afterwards an injunction were issued by the court; and for the proceedings in the said cause, the same being No. 6583, in equity these defendants refer to the record thereof and pray that the same may be taken as part hereof. They further say that in the said cause the complainant, by means of a cross-bill and an amendment thereto, sought upon various unfounded and false pretexts and devices, including those now set up and pretended in the fourth and fifth paragraphs of the bill, to vacate and avoid the said deed from herself and her husband to the said Sarah L. Crane, and the said deed of trust from Sarah L. Crane to Richard W. Tyler, in trust, to secure the loan made by the said William P. Jenks, as well as the said deed of trust from her husband and herself to said Donaldson and Prentiss, trustees, to secure the said Chipley notes, and controverted the right of the said William P. Jenks to the security of the said deed
39 of trust and the authority of the said Richard W. Tyler to sell thereunder, and whether the said Richard W. Tyler was a proper person or was disqualified to make such sale, as will appear by reference to the proceedings aforesaid.

They further say that the said cause, including the issues raised by the said cross-bill and the amendment thereto, was duly proceeded with, and that on the 11th of December, 1883, a final decree was rendered therein by this court in general term; a true copy whereof is filed herewith, marked J. S. J. Exhibit No. 1, and prayed to be taken as part hereof.

These defendants further say that from the said decree an appeal was taken by the complainant to the Supreme Court of the United States, and that the said decree was by the said court on the 14th of November, 1887, affirmed, and they pray leave to refer to the decree of affirmance by the said court, and that the same may be taken as part hereof.

As to the matters set up and pretended in the fourth and fifth paragraphs of the bill or elsewhere, the same impeaching in any way the aforesaid transaction of the said William P. Jenks or the validity of the said deed of trust from Sarah L. Crane to Richard W. Tyler, trustee, or the authority and fitness of the said trustee to execute and enforce the said security, these defendants say that the said matters have already been litigated by the complainant and adjudicated against her in the said cause, and they plead the said decrees in bar of the relitigation of the said matters, and pray the same benefit from this answer as if they had specially pleaded the said prior adjudication.

40 5. The allegations of the fifth paragraph are answered in the foregoing answer to the fourth paragraph.

6. These defendants have no knowledge nor any information as to the deed alleged in the sixth paragraph of the bill save that contained in the bill, and do not admit the same.

7. As to the proceedings in the above-mentioned cause, these defendants refer to the record thereof, and do not admit that the said proceedings are correctly alleged in the seventh paragraph, and for the opinions of this court and of the Supreme Court of the United

States directing and sustaining the said decrees these defendants refer to the reports thereof in 2 Mackey, 513, and 123 U. S., 297.

It is true that upon the said appeal to the Supreme Court of the United States a bond, approved as a supersedeas bond, was filed in the said cause on or about the 31st day of December, 1883, but these defendants deny that the legal effect of the said bond was to prevent or inhibit the execution and enforcement of the said deed of trust by the said Richard W. Tyler, trustee.

It is also true that the day after the said decree of the general term of this court, and on the 12th day of December, 1883, the said Richard W. Tyler, by said decree appointed receiver of the said property, with power, until a sale should be made by him under the said deed of trust, to take and hold the said property and to collect the rents and profits thereof, duly qualified as such receiver by giving the bond required by said decree, which bond was duly approved by this court, and that subsequently, at what time these defendants have no knowledge or information, the said
41 Keyser (who took no appeal from the said decree, and whose appointment by this court in special term was by the said decree in general term revoked) surrendered the possession of the said property to his successor in office, the said Richard W. Tyler, and that the latter accepted the said possession, and thereafter collected the rents and profits of said property until the sale of said property under and by virtue of the aforesaid deed of trust; but these defendants deny that the legal effect of the said supersedeas bond was to prevent or inhibit the qualification of the said Tyler as receiver, or the approval by this court of his bond as such receiver, or the aforesaid surrender and acceptance of the possession of said property.

These defendant- further deny that the said transfer of possession was made with any purpose of injuring the complainant, as alleged in said bill, or owing to any other cause than the desire on the part of said Tyler and also of the said Keyser to discharge faithfully their duties in the premises.

Further answering, these defendants say that by the aforesaid decree of this court, afterwards affirmed by the Supreme Court of the United States, whilst the original bill of the said Benjamin U. Keyser, receiver, and the cross-bill of the complainant and the amendment thereto were dismissed as the principal objects thereof, the said cause was retained in this court as to certain matters, and among them as to the fund arising from the collection of the rents and profits of the property under the authority of the court, the said fund being claimed by the said Jane C. Hitz, complainant herein, and by the said Keyser, as receiver of the German-American national bank, and also by the said William P. Jenks, the claim of the last mentioned being that the said fund was bound for
42 any insufficiency of the proceeds of the sale to be made by the said Tyler, trustee under the said deed of trust, to pay the debt of the said William P. Jenks, with interest and costs, as by reference to the said decree, made part hereof, will more fully appear.

The sale of the property by the said Tyler was made on the 26th of March, 1884, and the net proceeds thereof were insufficient by the sum of $4,745.73 to pay the indebtedness secured by the said deed of trust.

After the said sale the said parties claiming the said fund in court, as above mentioned, by proper proceedings in the said cause litigated their respective rights thereto, the claim of the said William P. Jenks being based upon the said deficiency of $4,745.43, and the said claim being opposed as well by the said Keyser as the complainant herein, and in the said litigation the right of the said Jenks was affirmed by this court, in general term, by a decree dated July 13th, 1885. From the said decree the complainant appealed to the Supreme Court of the United States, by which court the said decree was affirmed on the 14th of November, 1887. The said appeal was heard and decided at the same time as the appeal from the decree of this court in said cause on the 11th of December, 1883.

And these defendants pray leave to refer to the proceedings in said litigation and the said decrees of this court and the Supreme Court of the United States as part of this answer. They also refer to the opinions of this court and the Supreme Court of the United States in respect of the said decrees published in 4 Mackey, 179, and 123 U. S., 297.

They further aver that the said decree of this court re-
43 versed, in respect of the claim of the said William P. Jenks, the report of the auditor of March 31, 1885, and directed a new reference to the auditor for an account and report pursuant—the said decree; that said account was accordingly stated, and the auditor filed his report under said reference on the 4th of August, 1885; that by the said report the auditor awarded the bulk of the said fund in court for the benefit of the said William P. Jenks, on account of taxes and assessments upon the said property, and awarded the balance of the said fund to him as payable by reason of the said sale of the property by Richard W. Tyler, trustee, and the deficiency of the proceeds of sale, as aforesaid, and that the said report was not excepted to, and pursuant to the rule of this court then in force became and was finally confirmed.

These defendants do not admit, but deny, the accuracy of what professes in the bill to be a statement of the proceedings in the said litigation, and for the said proceedings refer to the record of the same in this court, and pray such record may be taken as part of this answer.

And they are advised and aver that the right of the said William P. Jenks to the said fund necessarily involved the validity of the said sale made by Richard W. Tyler, trustee, under the said deed of trust to him, and that upon the said sale there was the said deficiency, and that by reason of the said deficiency the said William P. Jenks had become entitled to the said fund in court; all which matters were in the said litigation, in which they aver that the complainant appeared by counsel, finally adjudicated against the complainant, and they plead the said adjudication in bar of the re-

litigation of said matters in the present suit and pray the
44 same benefit from this answer as if they had specially pleaded the said prior adjudication.

8. These defendants admit that the said Richard W. Tyler, as trustee under the said deed of trust and in pursuance of the terms thereof, on or about the 3rd of March, 1884, advertised the said property for sale on the 26th of March, 1884. They believe that the copy of the advertisement of sale set out in the eighth paragraph of the bill is a true copy, and admit the same. They also admit that some time after the said advertisement a letter was sent to the said trustee by the counsel of the complainant, and that the paper set out purporting to be a copy of the said letter is a true copy thereof.

And these defendants on information and belief aver that at the time of the said advertisement and sale thereunder the principal of the debt secured by the said deed of trust was overdue nearly four years, and that no interest had been paid since some time before the filing of the bill by Benjamin U. Keyser, receiver, as above mentioned, and deny the sufficiency of the several pretences assigned as reasons why it was unlawful for the said trustee to exercise the powers vested in him by the deed of trust.

They are advised that the said decree of the 11th of December, 1883, whereby the injunction theretofore existing was in terms revoked, left the said trustee free to exercise the said powers, and that such exercise was not prohibited by the said supersedeas bond and could not be prohibited otherwise than by some judicial act prohibiting such exercise, and that neither the retention of the cause by the court for certain purposes, nor the possession of the property by its officer, especially when such possession was to con-
45 tinue, as declared by the decree, "until a sale shall be made under the said deed of trust," nor the other reasons, even if said reasons were true in fact, which is denied, could have the effect pretended by the said bill.

Further answering, these defendants on information and belief deny that the terms of sale of the said advertisements, the same being for cash, were in any degree harsh or unreasonable, considering the locality of the said property and its adaptation exclusively to business purposes and the class of persons likely to buy, and they especially deny that the said terms, as falsely alleged, were intended to injure or in fact injured the complainant.

They admit the sale of the said property, pursuant to the said advertisement, to Seth Caldwell, Jr., of the city of Philadelphia, at and for the sum of $29,200, and that it was conveyed by the said trustee to the said purchaser and by the latter to the said William P. Jenks by the deed made and recorded as alleged.

They are informed and believe that the said Seth Caldwell, Jr., was the friend of their late father and in his behalf purchased the said property.

The defendants deny any and all fraud in and about the said sale, and aver, on the contrary, that the same was in all respects fairly conducted, and that the price obtained was adequate and the

fair, reasonable, and market value of said property when sold, and that the grounds specifically stated in the bill upon which it is sought to have the said sale set aside, such as the number and character of the company present at the sale, the absence of *bona fide* bids, and the like, are false.

46 In respect of the allegations of the said bill to the effect that the said Richard W. Tyler was the agent of the said William P. Jenks, and in consequence disqualified to make such sale as trustee, these defendants, not admitting such agency as the same is alleged, aver that the pretended disqualification was litigated under the said cross-bill and amendment thereto and adjudicated against the complainant by the said decree of this court of the 11th of December, 1883, and these defendants pleaded the said adjudication in bar of the relitigation of the said pretension, and pray the same benefit from this answer as if they had specially pleaded the said prior adjudication, and they aver that the said Richard W. Tyler in all matters relating to the said sale acted impartially and exercised his best judgment for the interests of all parties concerned in said sale.

9. These defendants admit the death of their father testate at the time alleged, and that by his last will and testament he devised the said property to these defendants, his only children.

10. These defendants upon information and belief aver that the complainant well knew of the said advertisement and sale, and that she acquiesced in the said sale with full knowledge or the means of knowledge of all the circumstances attending the same, and that the claim now set up, more than six years after the said sale, is stale and ought not to receive the countenance of a court of equity. They deny that the reasons alleged for delay are either true in fact or sufficient in law. They aver that the complainant is possessed of large wealth, and that the expenses attending litigation in the alleged causes have not induced the said delay, as falsely

47 pretended. On the contrary, they aver and expect to prove that the complainant acquiesced in the said sale, but that about two or three years ago an unexpected and unprecedented rise in real-estate values in the locality where the said property is situated commenced and has continued to the present time, so that, although the said property was not when the bill was filed worth $200,000, as therein averred, it was worth three or four times its value at the time of the said sale, and that the present suit owes its origin to said rise and was brought, not to redress any wrong by reason of the said sale, but for the fraudulent purpose, under the pretext of such wrong, of depriving these defendants of what is justly and equitably their own.

And having fully answered the said bill, these defendants pray to be hence dismissed with costs; and as in duty, &c.

JOHN STORY JENKS.
WILLIAM HENRY JENKS.
RACHEL STORY JENKS RANDOLPH.

W. D. DAVIDGE,
Sol'r for Def'ts.

STATE OF PENNSYLVANIA, } ss:
City of Philadelphia, }

We do solemnly severally swear that we have heard read the foregoing answer by us subscribed and know the contents thereof, and that the facts therein stated upon our personal knowledge are true, and those stated upon information and belief we believe to be true.

JOHN STORY *STORY* JENKS.
WILLIAM HENRY JENKS.
RACHEL STORY JENKS RANDOLPH.

48 Subscribed and sworn to before me this 29th day of May, 1891.

JOHN W. LEWIS,
[SEAL.] *Notary Public, N. E. Corner Broad & Chestnut Sts.*

STATE OF PENNSYLVANIA, } ss:
County of Philadelphia, }

I, William B. Mann, prothonotary of the courts of common pleas of said county, which are courts of record, having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following certificate, do certify that John W. Lewis, Esquire, before whom the annexed oath or affirmation was made, was at the time of so doing a notary public for the Commonwealth of Pennsylvania, residing in the county of Philadelphia, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgments and proofs of deeds or conveyances for lands, tenements, and hereditaments in the State of Pennsylvania, and to all whose acts as such full faith and credit are and ought to be given as well in courts of judicature as elsewhere, and that I am well acquainted with the handwriting of the said notary public and verily believe his signature thereto is genuine, and that said oath or affirmation purports to be taken in all respects as required by the laws of the State of Pennsylvania.

49 In testimony whereof I have hereunto set my hand and affixed the seal of this court this 29th day of May, in the year of our Lord one thousand eight hundred and ninety-one.

WILLIAM B. MANN,
[SEAL.] *Prothonotary.*

Answer of Richard W. Tyler.

Filed June 1, 1891.

In the Supreme Court of the District of Columbia. In Equity.

JANE C. HITZ, Complainant,
vs.
JOHN STORY JENKS, WILLIAM HENRY JENKS, RACHEL Jenks Randolph, Sarah L. Crane, Richard W. Tyler, and Enoch Totten, Defendants.
No. 2800, Doc. 31.

The answer of Richard W. Tyler, a defendant, to the bill of complaint of Jane C. Hitz.

This defendant, reserving to himself all rights of exception to the said bill of complaint, for answer thereto, says:

1. He admits the allegations of the first paragraph of the bill.

2. He believes and admits that the complainant is the
50 daughter of Michael Shanks, now deceased, late of the city of Washington, in this District, and that many years ago she intermarried with John Hitz, who is now living, and hence that she was a married woman at and before the filing of the bill. He avers on information and belief that for the past ten years and upwards she has lived separate and apart from her said husband, and that she is educated, conversant with business affairs, and entirely capable of the management with skill and ability of her estate and business, and was so at and before and since the time when she voluntarily elected to live separate and apart from her said husband. As to the allegations of the second paragraph, not answered, and as to the particulars of all the allegations of the said paragraph, this defendant has no knowledge or information, and does not admit the same.

3. He admits that the complainant inherited from her said father the alleged parcel of land. He admits that the said land is improved, but the buildings are not large, and, on the contrary, small and old, giving little or no additional value to the land. He denies that the value of the land and improvements is as alleged.

4. This defendant on information and belief says that on or about the 14th of May, 1877, an institution called the German-American savings bank, then and there-fore engaged in the business of banking in the city of Washington, was, in pursuance of the laws of the United States, converted into a national bank, called the German-American national bank. The said national bank became
insolvent on or about the 30th of October, 1878, and Benja-
51 min U. Keyser, now deceased, was duly appointed receiver thereof by the Comptroller of the Currency. Among the assets of the said German-American savings bank to which the said national bank succeeded were two notes dated January 5, 1876, and made by William R. Chipley, each note being for the sum of ten thousand dollars. These notes were secured by the deed of trust

upon the property, mentioned in the third paragraph of the bill, made by the said John Hitz and the complainant, his wife, on the 26th of January, 1876, to R. B. Donaldson and C. E. Prentiss, trustees.

On the 16th of June, 1877, the said John Hitz and the complainant, his wife, by a deed of that date, duly executed, acknowledged, and recorded, a copy whereof is filed with the bill, conveyed the said property to Sarah L. Crane in fee-simple for the consideration of forty thousand dollars, as declared by the deed.

On or about the 20th of June, 1877, William P. Jenks, in good faith and without notice, direct or indirect, of any defect or infirmity in the said deeds or either of them, loaned upon the said property the sum of twenty thousand dollars, it being part of the transaction that by means of the said loan the said Chipley notes should be paid and the said deed of trust to Donaldson and Prentiss, trustees, to secure the same, should be released, and thereby the deed of trust to be given to secure the said loan should become the first lien upon the said property. Said loan was accordingly so applied and the said deed of trust released, and to secure the said loan the deed of trust from Sarah L. Crane to this defendant, as trustee, a copy whereof is filed with the bill, was duly executed, acknowledged, delivered, and recorded.

Notwithstanding the said national bank had the benefit of the loan made by the said William P. Jenks, the said receiver,
52 either through ignorance or fraud, on or about the 10th of January, 1879, filed his bill in this court against the said William P. Jenks, this defendant, the complainant, Sarah L. Crane, and others, claiming that the said Chipley notes had not been paid, and that the said deed of trust to Donaldson and Prentiss, released as aforesaid, was illegally released, and should be reinstated as the first lien upon the said property; and praying, among other things, that the sale of the said property by this defendant, trustee, who had then advertised the same for sale on default in the payment of interest, should be enjoined. A restraining order, and afterwards an injunction, were issued by the court; and for the proceedings in the said cause, the same being No. 6583, in equity, this defendant refers to the record thereof and prays that the same may be taken as part hereof. He further says that in the said cause the complainant, by means of a cross-bill and an amendment thereto, sought upon various unfounded and false pretexts and devices, including those now set up and pretended in the fourth and fifth paragraphs of the bill, to vacate and avoid the said deed from herself and her husband to the said Sarah L. Crane, and the said deed of trust from Sarah L. Crane to this defendant to secure the loan made by the said William P. Jenks, as well as the said deed of trust from her husband and herself to said Donaldson and Prentiss, trustees, to secure the said Chipley notes, and controverted the right of the said William P. Jenks to the security of the said deed of trust and the authority and qualification of this defendant, as trustee, to sell thereunder, as will appear by reference to the proceedings aforesaid.

He further says that the said cause, including the issues raised by the said cross-bill and the amendment thereto, was duly
53 proceeded with, and that on the 11th of December, 1883, a final decree was rendered therein by this court in general term, a true copy whereof is filed with the answer in this cause of John Story Jenks and other codefendants, and prayed to be taken as part hereof.

This defendant further says that from the said decree an appeal was taken by the complainant to the Supreme Court of the United States, and that the said decree was by the said court on the 14th of November, 1887, affirmed; and they pray leave to refer to the decree of affirmance by the said court, and that the same may be taken as part hereof.

As to the matters set up and pretended in the fourth and fifth paragraphs of the bill or elsewhere in the same, impeaching in any way the aforesaid transaction of the said William P. Jenks or the validity of the said deed of trust from Sarah L. Crane to this defendant, trustee, or the authority and fitness of the said trustee to execute and enforce the said security, this defendant says that the said matters have already been litigated by the complainant and adjudicated against her in the said cause, and they plead the said decrees in bar of the relitigation of the said matters and pray the same benefit from this answer as if they had specially pleaded the said prior adjudication.

5. The allegations of the fifth paragraph are answered in the foregoing answer to the fourth paragraph.

6. This defendant has no knowledge nor any information as to the deed alleged in the sixth paragraph of the bill, save that contained in the bill, and does not admit the same.

7. As to the proceedings in the above-mentioned cause, this defendant refers to the record thereof, and does not admit that
54 the said proceedings are correctly alleged in the seventh paragraph, and for the opinions of this court and of the Supreme Court of the United States, directing and sustaining the said decrees, this defendant refers to the reports thereof in 2 Mackey, 513, and 123 U. S., 297.

It is true that upon the said appeal to the Supreme Court of the United States a bond, approved as a supersedeas bond, was filed in the said cause on or about the 31st of December, 1883, but this defendant denies that the legal effect of the said bond was to prevent or inhibit the execution and enforcement of the said deed of trust by him as trustee.

It is also true that the day after the said decree of the general term of this court, and on the 12th of December, 1883, this defendant, by said decree appointed receiver of the said property, with power, until a sale should be made by him under the said deed of trust, to take and hold the said property and to collect the rents and profits thereof, duly qualified as such receiver by giving the bond required by said decree, which bond was duly approved by this court, and that subsequently, some time in January, 1884, the said Keyser (who took no appeal from the said decree and whose au-

thority as to such rents and profits given by this court in special term was by the said decree in general term revoked) surrendered the possession of the said property to this defendant, and that the latter accepted the said possession *and thereafter collected the* rents and profits of said property until the sale of the same under and by virtue of the said deed of trust; but this defendant denies that the legal effect of the said supersedeas bond was to prevent or
55 inhibit the qualification of the said Tyler, as receiver, or the approval by this court of his bond as such receiver, or the aforesaid surrender and acceptance of the possession of said property.

This defendant further denies that the said transfer of possession was made with any purpose of injuring the complainant, as alleged in said bill, or owing to any other cause than the desire on the part of this defendant and also of the said Keyser to discharge faithfully their respective duties in the premises.

Further answering, this defendant says that by the aforesaid decree of this court, afterwards affirmed by the Supreme Court of the United States, whilst the original bill of the said Benjamin U. Keyser, receiver, and the cross-bill of the complainant and the amendment thereto were dismissed as to the principal objects thereof, the said cause was retained in this court as to certain matters, and among them as to the fund arising from the collection of the rents and profits of the property under the authority of the court, the said fund being claimed by the said Jane C. Hitz, complainant herein, and by the said Keyser, as receiver of the German-American national bank, and also by the said William P. Jenks, the claim of the last-mentioned being that the said fund was bound for any insufficiency of the proceeds of the sale to be made by this defendant, trustee, under the said deed of trust, to pay the debt of the said William P. Jenks, with interest and costs, as by reference to the said decree, made part hereof, will more fully appear.

The sale of the property by this defendant, as trustee, was made on the 26th of March, 1884, and the net proceeds thereof were
56 insufficient by the sum of four thousand seven hundred and forty-five dollars and seventy-three cents to pay the indebtedness secured by the said deed of trust.

After the said sale the said parties claiming the said fund in court, as above mentioned, by proper proceedings in the said cause, litigated their respective rights thereto, the claim of the said William P. Jenks being based upon the said deficiency of four thousand seven hundred and forty-five dollars and forty-three cents, and the said claim being opposed as well by the said Keyser as the complainant herein; and in the said litigation the right of the said Jenks was affirmed by this court in general term by a decree dated July 13th, 1885. From the said decree the complainant appealed to the Supreme Court of the United States, by which court the said decree was affirmed on the 14th of November, 1887. The said appeal was heard and decided at the same time as the appeal from the decree of this court in said cause of the 11th of December, 1883.

And this defendant prays leave to refer to the proceedings in said litigation and the said decrees of this court and the Supreme Court

of the United States as part of this answer. He also refers to the opinion of this court and the Supreme Court of the United States in respect of the said decrees, published in 4 Mackey, 179, and 123 U. S., 297.

He further avers that the said decree of this court reversed, in respect of the claim of the said William P. Jenks, the report of the auditor of March 31, 1885, and directed a new reference to the auditor for an account and report pursuant to the said decree; that said account was accordingly stated and the auditor filed his report under the said reference on the 4th of August, 1885; that by the said report the auditor awarded the bulk of the said fund
57 in court for the benefit of the said William P. Jenks, on account of taxes and assessments upon the said property, and awarded the balance of the said fund to him as payable by reason of the said sale of the property by this defendant and the deficiency of the proceeds of sale, as aforesaid, and that the said report was not excepted to, and pursuant to the rule of this court then in force became and was finally confirmed.

This defendant does not admit, but denies, the accuracy of what professes in the bill to be a statement of the proceedings in the said litigation, and for the said proceedings refers to the record of the same in this court, and prays such record may be taken as part of this answer.

And he is advised and avers that the right of the said William P. Jenks to the said fund necessarily involved the validity of the said sale made by this defendant, trustee, under the said deed of trust to him, and that upon the said sale there was the said deficiency, and that by reason of the said deficiency the said William P. Jenks had become entitled to the said fund in court; all which matters were in the said litigation, in which they aver the complainant herein appeared by counsel and took part, finally adjudicated against the complainant, and they plead the said adjudication in bar of the relitigation of said matters in the present suit and pray the same benefit from this answer as if they had specially pleaded the said prior adjudication.

This defendant further avers that in pursuance of the said proceedings and decree of the 13th of July, 1885, he duly exhibited his account as receiver of the said property to the said auditor, who thereupon stated and adjusted the said accounts, as will ap-
58 pear by his aforesaid report, and that upon the final confirmation, as aforesaid, of the said report this defendant disbursed the moneys in his hands as receiver in accordance therewith and in all respects fulfilled the requirements of the said report, and thereby, as he is advised, closed and determined all matters growing out of his office of receiver.

8. This defendant admits that he, as trustee under the said deed of trust and in pursuance of the terms thereof, on or about the 3rd of March, 1884, advertised the said property for sale on the 26th of March, 1884. He believes that the alleged copy of the advertisement of sale set out in the eighth paragraph of the bill is a true copy, and admits the same. He also admits that some time after

the said advertisement a letter was sent to him by the counsel of the complainant, and that the paper set out purporting to be a copy of the said letter is a true copy thereof.

And this defendant avers that at the time of the said advertisement and sale thereunder the principal of the debt secured by the said deed of trust was overdue nearly four years, and that no interest had been paid since some time before the filing of the bill by Benjamin U. Keyser, receiver, as above mentioned, and denies the sufficiency of the several pretences assigned as reasons why it was unlawful for him, as trustee, to exercise the powers vested in him by the deed of trust.

He is advised that the said decree of the 11th of December, 1883, whereby the injunction theretofore existing was in terms revoked, left this defendant, as trustee, free to exercise the said powers, and that such exercise was not prohibited by the said supersedeas bond and could not be prohibited otherwise that by some judicial
59 act prohibiting such exercise, and that neither the retention of the cause by the court for certain purposes nor the possession of the property by its officer, especially when such possession was to continue, as declared by the decree, "until a sale shall be made under the said deed of trust," nor the other reasons alleged, even if said other reasons were true in fact, which is denied, could have the effect pretended by the said bill.

Further answering, this defendant denies that the terms of sale of the said advertisement, the same being for cash, were in any degree harsh or unreasonable, considering the locality of the said property and its adaptation exclusively to business purposes and the class of persons likely to buy, and he especially denies that the said terms, as falsely alleged, were intended to injure, or in fact injured, the complainant.

He admits the sale of the said property pursuant to the said advertisement to Seth Caldwell, Jr., of the city of Philadelphia, at and for the sum of twenty-nine thousand two hundred dollars, and that it was conveyed to the said purchaser and by the latter to the said William P. Jenks, by the deeds made and recorded as alleged.

At the time of the said sale this defendant had no knowledge or information that the said Seth Caldwell, Jr., bought the said property on behalf of the said William P. Jenks, but since the filing of the bill in this cause has been informed that such was the case.

This defendant denies any and all fraud in and about the said sale, and avers, on the contrary, that the same was in all
60 respects fairly conducted, and that the price obtained was adequate and the fair, reasonable, and market value of said property when sold, and that the grounds specifically stated in the bill upon which it is sought to have the said sale set aside, such as the number and character of the company present at the sale, the absence of *bona fide* bids, and the like, are false. In respect of the allegations of the said bill to the effect that this defendant was the agent of the said William P. Jenks, and in consequence disqualified to make such sale as trustee, this defendant, not admitting such agency as the same is alleged, avers that the pretended disqualifi-

cation was the subject of litigation and litigated under the said cross-bill an amendment thereto and adjudicated against the complainant by the said decree of this court of the 11th of December, 1883; and this defendant pleads the said adjudication in bar of the relitigation of the said pretension, and prays the same benefit from this answer as if he had specially pleaded the said prior adjudication; and he avers that in all matters relating to the said sale he acted impartially and exercised his best judgments for the interests of all parties concerned in said sale.

9. This defendant admits the death of the said William P. Jenks, testate at the time alleged, and that by his last will and testament he devised the said property to the said codefendants mentioned in the ninth paragraph.

10. This defendant avers that the complainant well knew of the said advertisement and sale, and that she acquiesced in the said sale with full knowledge or the means of knowledge of all the
61 circumstances attending the same, and that the claim now set up more than six years after the said sale and after the death of the said William P. Jenks, and, as he avers to be the fact, of Thomas J. Fisher, who made the said sale as the auctioneer, is stale and ought not to receive the countenance of a court of equity. He denies that the reasons alleged for delay are either true in fact or sufficient in law. He avers that the complainant is possessed of large wealth, and that the expenses attending litigation in the alleged causes have not induced the said delay as falsely pretended. On the contrary, he avers that the complainant acquiesced in the said sale, but that about two or three years ago an unexpected and unprecedented rise in real-estate values in the locality where the said property is situated commenced and has continued to the present time, so that, although the said property was not worth, when the bill was filed, two hundred thousand dollars, as therein falsely averred, it was worth three or four times its value at the time of the said sale, and that the present suit owes its origin to said rise and was brought not to redress any wrong by reason of the said sale, but for the fraudulent purpose, under the pretext of such wrong, of depriving the said codefendants, the children of the said William P. Jenks, of what is justly and equitably their own.

And, having fully answered the said bill, this defendant prays to be hence dismissed with costs, and as in duty, &c.

RICHARD W. TYLER.

W. D. DAVIDGE,
Sol'r for Def't.

62 DISTRICT OF COLUMBIA, *ss*:

I do solemnly swear that I have read the foregoing answer by me subscribed, and know the contents thereof, and that the facts therein stated as of my personal knowledge are true, and those stated upon information and belief I believe to be true.

RICHARD W. TYLER.

Subscribed and sworn to before me this 1st day of June, 1891.

CHAS. T. SPARO,
Notary Public.

[SEAL.]

63 EXHIBIT "J. S. J. No. 1."

Filed June 1, 1891.

In the Supreme Court of the District of Columbia. In Equity.

Cause No. 6583, Docket 19.

BENJAMIN U. KEYSER, Receiver, &c., *vs.* JOHN HITZ and Others.	Original Bill.
SAME *v.* SAME.	Amended and Supplemental Bill.
JANE C. HITZ *v.* BENJAMIN U. KEYSER and Others.	Cross-bill.
SAME *v.* SAME.	Amendment to Cross-bill.
SARAH L. CRANE *v.* BENJAMIN U. KEYSER and Others.	Cross-bill.

This cause came on to be heard at this term and was argued by counsel and considered by the court, and the court being of the opinion that the complainant Benjamin U. Keyser, receiver, as the holder of the notes made by William R. Chipley, is not entitled to any relief, and that the deed of conveyance dated the 16th of

64 June, 1877, made by Jane C. Hitz and John Hitz to Sarah L. Crane in fee-simple, conveyed as well the right, title, interest, and estate of the said Jane C. Hitz as of the said John Hitz in and to the real estate and premises in said deed mentioned and referred to, and that there is no equity shown in this cause to prevent or delay the execution and enforcement of the deed of trust dated the 18th of June, 1877, whereby the said Sarah L. Crane conveyed the said real estate and premises to Richard W. Tyler in trust to secure the payment of the debt of William P. Jenks, with interests and costs, as in and by the said deed of trust mentioned and provided, and that the deed of conveyance dated the 11th of November, 1878, from Sarah L. Crane to the complainant, and the guaranty made by the said Sarah L. Crane about the same time and endorsed on the notes aforesaid, were null and void; and, further, that the complainant, under the said conveyance to him from the said Sarah L. Crane, collected the rents and profits of the said real estate and premises until the said conveyance was annulled by the decree in

special term, and after said decree continued to collect the said rents and profits under the order passed in special term on the 15th of December, 1881, authorizing such collection, and requiring the rents and profits to be paid into court from month to month, and that in pursuance of such order sundry payments have been made into court, and that for all and singular the said rents and profits the complainant ought to account, but that the said rents and profits are claimed, as the court is informed, by the said William P. Jenks as part of the security afforded by the said deed of trust, and by the said Jane C. Hitz as her separate property, and by the com-

65 plainant as the holder of judgments recovered against the said John Hitz, and that to enable the said account to be taken and the said claims to be litigated and determined, this cause should be retained:

Therefore it is by the court ordered, adjudged, and decreed, this 11th day of December, A. D. 1883, as follows:

First. That the injunction granted on the 21st of February, 1879, enjoining the sale by the said Richard W. Tyler of the said real estate and premises conveyed to him in trust —, and the same is hereby, dissolved, and that the decree in special term, so far as the same holds that the said deed of conveyance from Jane C. Hitz and John Hitz did not convey the right, title, interest, and estate of the said Jane C. Hitz in and to the said real estate and premises, and so far as the same retains the said injunction in respect of such right, title, interest, and estate of the said Jane C. Hitz, be, and the same is hereby, reversed.

Second. That the said deed of conveyance from Sarah L. Crane to the complainant and the guarantee given by the former and endorsed on the aforesaid notes of William R. Chipley are null and void and were so when delivered and given, and are hereby ordered to be delivered up to be cancelled.

Third. That the complainant account for all and singular the rents and profits received and which should have been received by him before and since the decree in special term, and that the parties aforesaid claiming the said rents and profits have leave to litigate in this cause and as they may be advised their respective claims, and that for said purposes this cause be, and the same hereby is, retained.

66 Fourth. That the order passed in special term on the 15th of December, 1881, authorizing the collection of said rents and profits by the complainant be, and the same is hereby, revoked, and that the said Richard W. Tyler be, and he is hereby, appointed receiver, with power, until a sale shall be made under the said deed of trust, to take and hold possession of said real estate and premises, and to rent and manage the same, and to collect the rents and profits and apply the same to the payments of the taxes, insurance, and any proper expenses, and it shall be the duty of the said receiver, after such application, to pay from time to time the said rents and profits into court, and from time to time to make report to the court of the manner in which he has discharged his trust, and before entering upon the performance of his office as receiver the said

Richard W. Tyler shall give bond in the penal sum of five thousand dollars, and with a surety or sureties, to be approved by this court or one of the justices thereof, conditioned for the faithful discharge of the trust hereby reposed in him.

Fifth. That the said Jane C. Hitz pay to the parties entitled all costs incurred by and under the amendments of her cross-bill, filed on the 13th of November, 1880, so far as the rents and profits for which the complainant is required to account shall, without prejudice to the security of the said W. P. Jenks, be insufficient to pay such costs, and that the complainant pay to the parties entitled all the other costs in this cause.

Sixth. That the decree in special term, so far as the same is in any way inconsistent herewith, be, and the same is hereby, reversed.

67 Seventh. That this decree is without prejudice to the right of any party entitled to the reversion of the said real estate and premises or any interest in such reversion to redeem or to make claim, as such party may be advised, to any balance or portion thereof, which, upon a sale under the said deed of trust and the satisfaction of the debt secured thereby, with interest and costs, and of the expenses of sale, may remain in the hands of the trustee.

Eighth. That, save so far as this cause is retained, as above mentioned and decreed, the bill of the complainant, with the amendment and supplement thereto, and the cross-bill of Jane C. Hitz, with the amendment thereto, be, and the same are hereby, dismissed.

It is further ordered, adjudged, and decreed that the following-described original documents, now in evidence in this cause, be sent up to the Supreme Court, in addition to the record therein, to wit:

1. The deed bearing date June 16, 1879, from Jane C. Hitz and her husband, John Hitz, to Sarah L. Crane, known in the cause as Exhibit No. 5, and—

2. The "abstract" or notes of title, dated June 20, 1877, signed by Thomas S. Hopkins and Mahlon Ashford, and known in the cause as Exhibit No. 10.

From this decree Jane C. Hitz, complainant in her cross-bill and one of the defendants, prays an appeal to the Supreme Court of the United States; which appeal is allowed.

By the court:

D. K. CARTER,
Chief Justice.

68 *Separate Answer of Sarah L. Crane.*

Filed June 5, 1891.

In the Supreme Court of the District of Columbia, the 5th Day of June, 1899. In Equity.

JANE C. HITZ
vs.
JOHN STORY JENKS ET AL. } # 12800, Eq. Doc. 31.

Separate answer of Sarah L. Crane to the bill of complaint of said Jane C. Hitz.

This defendant, saving unto herself any and all right of exception to the said bill of complaint, for answer thereto or to so much thereof as she is advised that it is in anywise necessary or material for her to answer, says:

1. She denies any and all of the charges of fraud made in said bill.

2. She avers that in equity cause No. 6583 in this court, wherein one Benjamin U. Keyser, receiver of the German-American national bank, was complainant and the said Jane C. Hitz and this defendant and others were defendants, and wherein the said Jane C. Hitz filed a cross-bill and an amendment thereto, whereby she impleaded this defendant and others, she filed an answer stating in effect that in the matter of the said deed of trust to the said Richard W. Tyler she acted solely as a vehicle of title to the property mentioned and claimed no other interest therein, as by reference to the record of said cause hereof made a part will more fully appear, and that said cause was litigated, and this defendant's contention in this
69 respect was sustained by the decrees passed by this court in general term December 11, 1883; which said decree was on appeal affirmed by the Supreme Court of the United States on the 14th day of November, 1887, as will fully appear by said record.

3. And she is further advised, and so avers, that by reason of the sale of the property in question made by the said Richard W. Tyler and the insufficiency of the proceeds thereof to discharge the indebtedness secured thereby any and all of the legal title to said property so held by her, as aforesaid, was wholly divested from her.

4. And she is advised, and so avers, that complainant acquiesced in said sale, and that by the proceedings had and decrees passed in this court and the affirmance thereof by the Supreme Court of the United States the said complainant is estopped from denying the regularity and validity of said sale, and she pleads the said decrees in bar of are litigation of the said matter, and prays the same benefit from this answer as if she had specially pleaded said prior adjudication.

5. And she if further advised, and so avers, that the complainant's cause of action, if any she has under the allegations of her bill

originated more than six years before the filing of said bill, during all which time the said complainant acquiesced in said sale, and until after there had been a large rise in the value of the property mentioned, and is stale and should not receive the countenance of a court of equity, and pleads this staleness in bar of the said litigation, and prays the same benefit from the answer as if she had specially pleaded the same.

And having fully answered, &c.

SARAH L. CRANE.

70 Subscribed and sworn to before me this 4th day of June, A. D. 1891.

LOYAL D. ELDRIDGE,
U. S. Commissioner.

Joinder of Issue.

Filed June 16, 1891.

In the Supreme Court of the District of Columbia.

JANE C. HITZ
vs.
JOHN STORY JENKS ET AL. } Equity. No. 12800.

And now comes the said complainant and joins issue with the defendants, John Story Jenks, William Henry Jenks, Rachel Jenks Randolph, Sarah L. Crane, and Richard W. Tyler, on their several answers.

ENOCH TOTTEN,
Attorney for Complainant.

71 *Depositions for the Complainant.*

Filed August 3, 1898.

In the Supreme Court of the District of Columbia.

JANE C. HITZ
vs.
JOHN STORY JENKS ET AL. } In Equity. No. 12800.

WASHINGTON, D. C., *July 6th*, 1891—1.30 o'clock p. m.

Met pursuant to notice.

Present on behalf of the complainant, Mr. Totten; present on behalf of the defendants, Mr. Davidge and Mr. Mussey.

CHARLES C. DUNCANSON, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined—

By Mr. TOTTEN:

Q. What is your name? A. Charles C. Duncanson.
Q. Where do you reside? A. In Washington, D. C.
Q. What is your business? A. Auctioneer.

Q. How long have you been an auctioneer in Washington? A. For myself, since 1873, and prior to that time with W. L. Wall & Co.

Q. To what does your business extend—to real estate or personal estate or both? A. To all.

72 Q. Have you had much experience in the matter of selling real estate in Washington? A. Yes, sir.

Q. Are you acquainted with the property on the northeast corner of 9th and G streets, in the city of Washington? A. Yes, sir.

Q. On Wednesday, the 26th day of March, 1884, there was a sale or an attempted sale of that property, which occurred at half past 4 o'clock or after that time. Were you present on that occasion? A. I do not remember the day. I was present at the time the property was put up and sold under a trustee sale.

Q. Who was the trustee? A. I cannot say positively; I think it was Mr. Tyler or Mr. Rutherford.

Q. Mr. Richard W. Tyler? A. I think so; yes, sir.

Q. You remember the auctioneer, Thomas J. Fisher, do you? A. I think Mr. Fisher was the auctioneer.

Q. Do you remember to whom the property was knocked down? A. I cannot say positively. I was under the impression that it was knocked down to a gentleman from Philadelphia, if I remember correctly.

Q. Do you remember his name? A. No; I cannot say that I do at this time.

Q. Do you remember why you went to this sale or for what purpose? A. I went there for the purpose, if there was any money in it, as I thought, of buying it.

73 Q. Was anybody engaged in the proposed speculation with you? A. Mr. O. C. Green.

Q. Then your object was to buy it for yourself and Green on joint account? A. It was.

Q. Did you buy it? A. No, sir.

Q. Why did you not buy it? A. I got the impression there at the sale that it was for the purpose of perfecting the title.

Mr. DAVIDGE: This answer is objected to as inadmissible.

By Mr. TOTTEN:

Q. For the purpose of perfecting the title in whom? A. Or of passing title, I should possibly say.

Q. Do you mean by that to say that you thought it was not a genuine sale?

Mr. DAVIDGE: I object to the question as leading.

A. Whether a suit had been commenced at that period in regard to the property or not, I cannot say, but it was understood that there would be one, or at least that was the impression gained by myself and some others that were there.

Q. How did you gain that impression and from whom?

Mr. DAVIDGE: The impression of the witness is objected to.

A. It has been some time ago, and I would not like to state positively, but it was such an impression as I considered at that time to be an authentic one and based on authentic information. I did not make a bid of any character on the property.

74 Q. You say you cannot state from whom or how you got that impression? A. I would not like to state positively.

Q. Give us your impression about it.

Mr. DAVIDGE: The question is objected to because the matter is not admissible.

A. It was from some of the parties who were interested—the trustees or the auctioneer—I cannot positively say which one.

Q. There was only one trustee? A. That is my impression now.

Mr. DAVIDGE: I object to the interpolation of Mr. Totten.

By Mr. TOTTEN:

Q. I want to ask you whether that trustee was Mr. Richard W. Tyler. A. I would not like to state positively whether it was or not. It may have been. I am not certain that Mr. Tyler was trustee. It may have been Col. Rutherford that I got this impression from.

Q. Who is Col. Rutherford? A. He is of the firm of Tyler & Rutherford.

Q. Was he of that firm at that date? A. I think so.

Q. Was he in partnership with Richard W. Tyler? A. I think so.

Q. You say that you did not make any bid. Did anybody else make a bid in your hearing? A. There were bids that were cried by the auctioneer.

Q. I want to know whether you heard any bids made by people in the crowd outside of and without regard to what the auctioneer said?

75 Mr. MUSSEY: The question is objected to because bids are not necessarily made by voice, but may be made otherwise.

A. I think some one started the property. You naturally must have a start to commence a sale.

Q. Did you hear any bids after the property had been started as you suggest? A. I cannot say that I did or did not.

Q. Can you say whether the bidding was dull or lively?

Mr. DAVIDGE: I object to the question as immaterial and without meaning.

A. I do not think it was lively.

Q. Give us your best recollection as to whether there was any bid made after the bid which you say you think was made to start the sale. A. My recollection is that there were 3 or 4 bids made.

Q. Do you know who made any of them? A. I do not.

Q. Do you know of any person who actually made a bid at that sale? A. I do not, sir.

Q. Have you any recollection as to who it was that made either of these bids you mention?

Mr. MUSSEY: The question is objected to as having been already answered.

A. I have not.

Q. State whether or not the auctioneer did not make all the bids that you heard. A. He cried them all.

Q. Do you think any third person or any outside person made the bids? A. My impression is that there was some one
76 there representing the gentleman from Philadelphia. It may have been the gentleman himself.

Q. Representing whom? A. As I understood, it was the gentleman who held the mortgage or who had loaned the money.

Q. That is, the creditor? A. Yes, sir.

Q. Your idea is that the bids were made by him or for him; is that it?

Mr. DAVIDGE: I object to the question as leading.

A. My impression is that a party was there representing him. It may have been that he was there in person, for all I know.

Q. With reference to these bids that you heard, who made them; this person or some other person? A. As I said before, I would not like to state positively. There was a starting bid; but who it was made by I would not like to state, because I do not think my recollection is clear enough to state it.

Q. What is your recollection as to these other bids that were made after the starting bid? Were they made by the same person? A. From my experience as an auctioneer, I would say no.

Q. I want your recollection as to the fact. A. I do not think the same person would bid against themselves or raise their own bid unless it was raised by some one else.

Q. Do you remember the amount of the first bid? A. I really do not.

Q. This property was advertised for sale for all cash. I
77 want to know what your information is upon the subject of such terms for such property. Are they usual or unusual in this District? A. It is rather unusual for a sale of real estate to be for all cash.

Q. Does the value of the property make any difference as to the regularity of making the terms all cash? A. If that is to follow the other question, my answer would be in the shape of a continuation of it, and I should say it is rather unusual for any sale to be for all cash, without giving preference to purchaser to take advantage of better terms.

Q. In your judgment, could a fair sale be made in this city in 1884, where the property was worth from twenty-five to thirty thousand dollars, for all cash?

Mr. DAVIDGE: I object to the question as calling for the opinion of the witness.

A. I do not think the competition would be as great as if advertised on terms of possibly one-third cash and the balance in one and two years.

Q. Do you remember whether there was a large crowd or company there on the day of the sale? A. I think there was a right fair company there.

Q. Give us your estimate as to about how many people were there, taking in all hands, boys and men.

Mr. DAVIDGE: The question is objected to as immaterial and incompetent.

A. I would not like to state positively; but I think before the sale was finished there were 25 or 30 persons there.

Q. Do you know or can you give us an idea as to the number of men who were there who could or who would be likely to
78 bid on such a property? A. I think there were five or six men there who would be able to buy it.

Q. Did any one of these men bid? A. I have no recollection of their bidding.

Q. How long did the auctioneer continue to cry the property at the sale? I want your best estimate as to the length of time? A. It was probably 15 or 20 minutes, I should think.

Q. Did you hear anybody say in the crowd that the property was involved in litigation; and, if you did, who was it? A. As I stated before, I got the impression, and I believe it to be the impression generally amongst the parties there with whom I was talking, that there would be, if there was not already, litigation.

Q. How many of the people in the crowd did you talk with upon that particular branch of the subject? A. Knowing pretty nearly every one around who would go to a sale of that kind, I suppose I was talking to 3 or 4 of the gentlemen.

Q. Were those gentlemen of that number whom you thought would be able to buy the property if they chose? A. Yes, sir.

Q. What can you say as to there being or not being open bidding at the sale—competing bids? A. I answered, I think, by saying that there were 3 or 4 bids, or that the auctioneer cried 3 or 4 bids. I also answered by saying that I did not know who were the bidders.

79 Q. What I want to get at is whether you actually heard anybody make a bid on the property after the first bid.

Mr. MUSSEY: The question is objected to as having been already answered.

A. "I do not remember." I think that was my answer.

Q. In 1884, in March, how many business men or men in this city were there who could pay twenty-nine thousand and odd dollars cash for a piece of property at public sale like this?

Mr. MUSSEY: The question is objected to as being merely a matter of conjecture.

A. I cannot say how many could have done so.

Q. Were there very many?

Mr. DAVIDGE: I object to the question because "very many" means nothing.

A. There were men in Washington and there were men at that sale who could possibly have paid that amount in cash.

Q. Were such men in the habit of attending sales of real estate made by auctioneers, so far as your knowledge as an auctioneer goes—I mean men who were able to pay in the neighborhood of $29,000 cash for a piece of property? A. In selling a piece of property of that character very wealthy men will sometimes attend themselves, or they will have representatives present.

CHAS. C. DUNCANSON.

Subscribed and sworn to before me this 6th day of July, 1891.

WM. HERBERT SMITH, *Examiner.*

The further taking of these depositions was thereupon adjourned to July 9th, 1891, at 2 o'clock p. m.

80 WASHINGTON, D. C., *July* 9, 1891—2 o'clock p. m.

Met pursuant to agreement.

Present on behalf of the complainant, Mr. Totten; present on behalf of the defendants, Mr. Davidge and Mr. Mussey.

Whereupon FREDERICK FREUND, a witness of lawful age called by and on behalf of the complainant, having been first duly sworn, is examined—

By Mr. TOTTEN:

Q. What is your business? A. Confectioner and caterer.

Q. Where do you reside? A. I reside at No. 702 Ninth St. N. W.

Q. How long have you resided in the city of Washington? A. Ever since 1859.

Q. Have you been engaged in the confectionery business all that time? A. All that time.

Q. Are you generally acquainted in the city of Washington? A. Yes, sir.

Q. Your residence is nearly opposite the property that used to belong to Mrs. Hitz, on the corner of 9th and G streets? A. Yes, sir.

Q. That is your place of business? A. Yes, sir.

Q. Do you remember a sale which was made there in March, 1884?

A. I don't know exactly the date; but I recollect that a sale
81 was made. I don't want to say anything about the date. I did not pay any attention to the date; but I saw it in the paper.

Q. Did you attend the sale? A. I was there.

Q. Do you know Mr. Richard W. Tyler? A. Yes, sir.

Q. Was he there? A. Yes, sir; I think he was.

Q. How many people were at the sale? A. I could not state

that exactly. I guess there was a dozen and a half or twenty people there; or something like that.

Q. Did you hear a bid made? A. I did.

Q. Who made it? A. I could not tell you that. I did not know these people who bid on it.

Q. How many bids did you hear? A. I think there were one or two bids; there — have been three bids for all I know. I am not sure.

Q. Were they all made by the same person, or were they made by the auctioneer? A. That is hard for me to tell. I do not know. I am not sure. I believe the report was that a Philadelphia firm bought it; that is all I know.

Q. Was there anything said there in your presence in reference to the subject of the sale as to the property being in litigation? A. I don't know.

Q. Do you know whether the auctioneer said anything about giving a good title under the sale? A. I don't recollect that there was anything spoken about the title or anything of that kind.

82 Q. How long did the crying of the sale continue? A. Not very long, because there was not enough people to bid on it. I don't think it was over ten minutes or so. It may have been a little more.

Q. Did you know any one, personally, who made a bid? A. No, sir. I might know them if I had thought of it. I asked Charley Duncanson why didn't he bid for it, &c. I thought it was a good piece of property and that it was very cheap; that is all I knew about it.

Q. What do you mean by very cheap? A. Well, I believe there was first $28,000 bid, and I believe then there was a bid of $28,500, or something in that neighborhood.

Q. That was the first offer? A. Yes, sir. I think so.

Q. Do you know who made that offer? A. No, sir.

Q. Did you see the man that made it? A. Yes; I believe I saw the man that did make the offer, but I did not know him.

Q. Where was he standing in reference to the auctioneer? A. I can't tell that.

Q. What was the next offer? A. I believe it was $28,500, and then there was another offer made. I believe there were two or three bids made, but I am not sure.

Q. Was this the last one? A. I believe there was $500 more offered, if I am not mistaken. I believe $500 more was the last offer.

83 Q. You mean $500 increase on the other bid? A. Yes, sir; something in that neighborhood.

Q. Do you know to whom it was knocked down? A. It was knocked down and then I asked Capt. Tyler: Captain, did you buy it? He did not say exactly, but he said a Philadelphia firm bought it.

Q. He said a Philadelphia firm bought it? A. Yes, sir; I think so.

Q. Did you say anything else? A. I told him it was very cheap.

Q. What did he say? A. He says, Yes; if a man wants to spend a right smart of money to fix it up—something in that way.

Q. You saw the man who made the first bid, and you heard it. Do you know whether he made the second bid? A. No, sir; I can't tell.

Q. Do you know whether he made the third bid? A. He must have; according to the buying of it, the way I understood it, he must have made the last bid; but, as I say, I did not take any such particular notice of it, because I was not interested. I did not have enough money to buy it, so I was not much bothered about it.

Q. You heard the man make the first bid. Was the man who made the last bid, upon which the property was knocked down, the same man as the man who made the first bid? A. I could not tell that, because I am not sure. I do not well recollect.

Q. Why did you say to Capt. Tyler that you thought the property was cheap? A. Well, we were conversing there, I think, after the sale. I think he came over to my place of business, if
84 I am not very much mistaken.

Q. Was there anybody at that sale who was able, so far as you know, to buy that property for all cash? A. I expect Charley Duncanson could. He was there and I suppose he could have bought it, if he wanted to.

Q. Was there anybody else there who was able to pay all cash for such a piece of property? A. I don't think there was. I cannot tell. There might have been somebody there that had plenty of money, but, according to my judgment, Charley Duncanson was the only one I knew.

Q. Did you observe any men in the crowd who were well-known business men here of financial responsibility? A. I did not.

Q. Were any of these dozen or eighteen people that you saw boys, or colored men and the like? A. Yes, sir; I know there was boys around there.

Q. Do you count them in with the eighteen? A. No; I don't think I did. I did not count them at all. I only judge there was that many people there. I suppose some of the men who were there can tell something about that. I did not count them and I don't know anything about that, but I should judge that there was a crowd of maybe twenty, for all I know. I don't think there was any more. There was a very small attendance; as small an attendance as I ever saw at a sale—that is, at such a big sale as that was.

Q. Were these bids which you heard apparently competing bids?

85 Mr. DAVIDGE: I object to the question as calling for an opinion of the witness and for his conjecture.

A. I don't know.

Q. Did there seem to be any actual anxiety in the crowd to buy that property?

Mr. DAVIDGE: I object to the question because it calls for the opinion of the witness and because it is guess-work.

A. There was not any lively work going on there in bidding on it. That is all I know. There was not anything exciting like you sometimes meet at auctions.

Cross-examination.

By Mr. DAVIDGE:

Q. You did not propose to buy it, did you? A. No, sir.

Q. You had not the means to buy? A. No, sir.

Q. You were there merely as a casual spectator? A. Yes, sir.

Q. It was in the neighborhood of your place of business and you thought you would go and attend the sale? A. Yes, sir.

Q. You say that you cannot tell how many people were there? A. I cannot tell; no, sir. I did not count them.

Q. You were not interested in ascertaining the number of people? A. No, sir.

Q. You were not concerned in any way in the sale? A. No, sir.

Q. There may have been a dozen and a half or there may have been twenty and there may have been more, I presume?

86 A. No; I don't think there was more. It was a small attendance, but in making up a crowd of twenty, you know, it takes a right smart of people.

Q. At the same time you took no pains to ascertain the number of bidders? A. No, sir; I did not.

Q. You had no interest in finding out the character of those bidders or whether they were men of means or not? A. No, sir; I might have, but I didn't do it.

Q. You had no interest in inquiring? A. No, sir.

Q. You did not know a great number of them, did you? A. No, sir.

Q. About how many in the twenty do you think you knew? Can you recall anybody else but Charlie Duncanson? A. Charlie Duncanson and Capt. Tyler and one or two more, but I don't know their names.

Q. Those were all you knew? A. Yes, sir.

Q. You think there were two or three bids upon the property? A. Yes, sir; something like that.

Q. The first bid, you think, was for $28,500? A. I believe it was something like that; $28,000 or $28,500. There were two or three bids made.

Q. Do you recollect what was the price the property was struck off for? A. I believe it was—it was not $30,000, I know.

Q. Can you recall now at what price that property was struck off? A. I believe it was somewhere in the neighborhood of $30,000 or $29,000, something of that kind. I won't say exactly.

87 Q. You had not interest enough in the matter to fix that in your memory, had you? A. No, sir.

FREDERICK FREUND,
By the Examiner.

JOHN DALY, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined—

By Mr. TOTTEN:

Q. What is your occupation? A. Plumber.
Q. How long have you resided in the city of Washington? A. About forty-two years.
Q. Where did you reside in March, 1884? A. At 408 G street N. W.
Q. Are you acquainted with the property on the northwest corner of 9th and G streets? A. Yes, sir.
Q. The property formerly belong- to Mrs. Hitz? A. Yes, sir.
Q. There was a sale took place there on or about the 26th of March, 1884. Were you present at that sale? A. Yes, sir.
Q. Did you occupy any portion of that property? A. Yes, sir.
Q. What portion of it? A. 703 9th St.
Q. For what purpose? A. A plumber's shop.
Q. That is your business—a plumber? A. Yes, sir.
88 Q. Did you observe this sale—were you amongst the people at the sale? A. I was one of the crowd.
Q. How far were you from the auctioneer? A. I don't think I was over thirty-five feet.
Q. The auctioneer was Thomas J. Fisher, was it not? A. I don't remember who the auctioneer was now.
Q. How many people were in attendance at the sale? A. I would judge there was perhaps about twenty-five there.
Q. That included men and boys?

Mr. DAVIDGE: I object to the question as leading.

A. All standing and looking on there; yes, sir.
Q. Did that include men and boys?

Mr. DAVIDGE: I object to the question as more objectionably leading.

A. Yes, sir.
Q. Did you hear any bids made there? A. Yes, sir.
Q. How many? A. There were two or three different bids.
Q. By different people? A. I think the auctioneer sung out that he had a bid for a certain amount. I don't remember exactly what the amount was.
Q. Do you know who made the first bid? A. No, sir.
Q. Did the auctioneer make it? A. That I couldn't say.
Q. Do you know who made any bid? A. No, sir.
Q. Did you hear any person other than the auctioneer
89 cry out these bids? A. I didn't take any notice who was crying out at all.
Q. Was there anything said about the condition of the title to the property by the auctioneer? A. I didn't hear anything said about the title at all. I heard remarks made that it was a kind of sham sale.
Q. Where did you hear those remarks?

Mr. DAVIDGE: I object to the question as incompetent, immaterial, and as hearsay.

A. From parties standing around.

Mr. DAVIDGE: I object to the answer for the same reason.

Q. At the time of the sale? A. Yes, sir.

Q. Was there any reason assigned for that opinion? A. The only reason was that the property was mixed up in that German-American bank.

Q. Did you hear anything said about its being involved in litigation? A. There was some talk about it by parties around there.

Q. How many different people did you hear speak about this property being in litigation? A. Well, there were several of my acquaintances. I don't know exactly who they were now. We had a general talk about it.

Q. Did you know many of the people there? A. Well, I knew Mr. Elmore and Mr. Scaggs and some of the tenants that occupied the premises there were around at the sale.

Q. Do you know how many of the tenants? A. I think there were some three or four of them.

Q. Did you know Mr. Tyler, the trustee? A. I knew Mr.
90 Tyler, of Tyler and Rutherford, the agents for the property at that time.

Q. Was he there? A. Yes, sir.

Q. Was Mr. Rutherford there? A. This gentleman here (indicating Capt. Tyler) is Mr. Rutherford, is it not?

Q. No; that is Mr. Tyler. A. Well, his partner, Mr. Rutherford, was there.

Q. Did you see Mr. Tyler there? A. I couldn't say positively, but I think he was; I am not sure.

Q. Were you occupying one of the pieces of property at that time? A. Yes, sir.

Q. Who had charge of the property and was collecting the rents? A. I think Sherman had it then, and Tyler & Rutherford had it afterward. I am not positive now which it was; I know Sherman had it for a good while.

Q. He was succeeded by whom? A. By Tyler and Rutherford.

Q. How long did you stay in the premises? A. Afterwards?

Q. Yes. A. I couldn't say exactly; maybe one or two years.

Q. Who collected the rent from you? A. Tyler and Rutherford.

Q. What time did they begin in reference to this sale? Was it before or after? A. I am under the impression that it was afterwards; I am not certain about that, though.

91 Q. Did either Mr. Tyler or Mr. Rutherford make a bid on the property, that you heard? A. I could not say.

Q. Did you have any conversation with Mr. Tyler on the day of the sale? A. No, sir.

Q. Did you know any man in the company there who was of known financial responsibility and able to pay all cash for that piece of property? A. No, sir; I did not.

Q. How long did the sale continue—I mean the crying of the sale? A. That I could not say; I didn't pay any attention to it much.

Q. How many different people did you say said that this was a sham sale, or words to that effect? A. We were talking—perhaps Mr. Elmore and some others—I don't remember now. They said that it was looked upon in that way.

Q. Who is Mr. Elmore? A. He was a carpenter that occupied a shop across the street.

Q. Where does he live now? A. He lives on 6th St. between G and H.

Q. What time in the day was this sale? A. I think it was some time in the afternoon. I don't know what time.

Q. Do you remember whether there was a bell rung or not? A. That I couldn't say. I am not positive whether there was or not.

92 Q. Was your shop in one of those three-story houses or in the corner part? A. On the 9th St. part—in the two-story part.

Q. There are two three-story houses on the property on G street, are there not? A. I think they are four stories.

Q. Were they occupied at that time? A. Yes, sir.

Q. Was the property on 9th St. also occupied? A. Yes, sir.

Q. All of it? A. I think all of it was occupied.

Q. You think there were three or four of the tenants standing around in the company? A. I think Mr. Plant was there, and I think Mr. Woodruff was there. I don't remember who was in the corner store at the time.

Q. You said, I believe, that you heard no open competing bidding? A. No; I didn't hear any.

Q. Did you hear any open, competing bids?

Mr. DAVIDGE: I object to the question because it is obscure and not intelligible.

A. No; I didn't hear any.

Q. Did you hear any open, loud bidding?

Mr. DAVIDGE: I object to the question for the same reason.

A. No, sir.

Cross-examination.

By Mr. DAVIDGE:

Q. What do you mean by open, competing bidding? A. Well, I mean with one party bidding against another; for instance, I would bid against you.

93 Q. You don't mean to say that these bids were not made, but merely that you did not hear them? A. No, sir; I didn't hear them.

Q. You heard the bids as cried, I understand, by the auctioneer? A. Yes, sir.

Q. But you do not recollect of hearing the parties make them? A. No, sir.

Q. You did not go there to buy the property, did you? A. No, sir.

Q. Had you means to buy it? A. No, sir.

Q. You spoke of the number of people there; you said there were twenty-five? A. Somewhere in that neighborhood. I didn't count them at all. I was only there as a looker-on; that's all.

Q. I suppose there might have been thirty or thirty-five, for all you know? A. There may have been.

Q. How many of that crowd do you think you knew? A. Perhaps I knew ten or twelve by sight.

Q. Of course you don't know how many in that crowd were able to buy the property according to the terms of the advertisement? A. No, sir; I do not.

Q. There may have been a dozen there, for all you know? A. I don't think there was many moneyed men there, excepting the men that were interested in it.

Q. You mean not many that you know? A. Not many that I knew.

94 Q. If moneyed men were not there, there may have been men there representing moneyed men? A. Yes, sir.

Q. You know that frequently takes place, don't you? A. Yes, sir.

Q. Indeed, it is not a very common thing for the capitalist not to appear himself. A. Yes, sir.

Q. But to get a man in moderate circumstances to bid for him? A. Yes, sir.

Q. It takes place all the time, don't it? A. Yes, sir.

Q. You say that between you and Elmore there was some talk about the sale not being a real sale. I think you called it a sham sale? A. Yes, sir; we might have talked it over with ourselves.

Q. You have no distinct recollection of it, have you? A. No, sir.

Q. Then you said you might have talked with somebody else beside Elmore, or might have been by when that conversation took place? A. Yes, sir; but I don't remember who it was.

Q. You don't know whether it was with one or more persons? A. No, sir.

95 Q. And you don't know what passed? A. No, sir.

Q. What was the talk about, generally? Was it about the property being in litigation? A. Yes, sir.

Q. Elmore was not able to buy the property, was he? A. I don't think he was.

Q. You think he is a poor man? A. I don't think he would buy that, anyhow.

Q. You think he was too poor to tackle a property of that amount? A. Yes, sir.

Q. You heard a number of bids cried by the auctioneer, I understand? A. Yes, sir.

s Q. You don't know how many? A. I don't know how many.

Q. You think two or three, or there may have been more? A. There may have been more; yes, sir.

Q. I understand that your attention was not directed to the parties who made these bids? A. No, sir.

Q. You only heard the auctioneer announce them? A. Yes, sir.

Q. How long did you say he was crying the property? A. That I couldn't say, sir. I don't know. I didn't take any note of what time it was.

Q. What was your recollection? A. It might have been going on for perhaps half an hour or so. I couldn't say exactly. I was just around there as a looker-on.

96 Q. The crying may have occupied half an hour, and the auctioneer, I suppose, did his best, did he not? A. It seemed so.

Q. Apparently so? A. Yes, sir.

Q. He kept it up for a good while? A. Yes, sir.

Q. What was the price of the property? A. I don't know exactly. I was under the impression that it was over $29,000.

Q. Do you know whether it was over $30,000? A. It might be over $30,000. I was led to believe at the time that it was over $29,000.

Q. Did you leave the sale before it was over, or were you there after the property was knocked down? A. I think I was there.

Q. But you had no interest in the sale? A. No, sir.

Q. You never expected to be called upon about it, did you? A. No, sir.

Q. You simply had your place of business in the neighborhood, and you went out to see the thing going on? A. Yes, sir; I went out to see the crowd.

Q. Who has talked to you about giving testimony in this case? A. I think this gentleman here (indicating Mr. Taylor).

Q. What Taylor? A. That old gentleman that was in here—I think his name is Taylor.

Q. An old man that lives on Vermont avenue, I think? A. Yes, sir.

97 Q. How long after the sale did you remain in this place that you occupied as a tenant? A. I could not say exactly, but I think it was somewhere in the neighborhood of two years.

Q. Then did you have any difference with the agents, Tyler and Rutherford? A. Yes, sir.

Q. They had occasion, I suppose, to put an end to the relation of tenant with you? A. Yes, sir.

Q. And they took proceedings against you to compel you to quit? A. Yes, sir.

Q. They summoned you before a justice of the peace? A. Yes, sir.

Q. And there was a judgment rendered against you? A. Yes, sir.

Redirect examination.

By Mr. TOTTEN:

Q. If there had been any open bidding going on there you were near enough to have heard it?

Mr. DAVIDGE: I object to the question because not called out on cross-examination, because it is leading, and because it is a matter of conjecture.

A. Yes, sir.

Q. How far were you from the auctioneer? A. I think I was about 25 feet.

Q. Could you hear what he said distinctly? A. I could hear when he hollered out. He might have whispered and I wouldn't hear him.

98 Q. I mean when he was crying out his sale. A. Yes, sir.

Q. Were you near enough to hear what was said in the crowd by way of bidding? A. Yes, sir; I could have heard that.

Q. You say you did not hear any? A. I didn't pay any attention to it. It didn't concern me, and I paid no attention to it.

Q. No attention to the bidding? A. No, sir.

Q. Did you hear any? A. I heard the auctioneer holler and sing out.

Q. I want to know if you heard anybody else bid. A. I couldn't say whether I did or not.

Q. Can you fix the time during which this crying was continued? You say that it was ten or fifteen minutes, and then you say that it may have been a half hour. A. I could not fix the time.

Q. I don't want you to fix it exactly. Was it as long as half an hour? A. No; it may not have been a half hour.

Q. Was it as long as fifteen minutes? A. Well, fifteen minutes is a right good while. It may have been that and it may have been more.

Recross-examination.

By Mr. DAVIDGE:

Q. The amount of it is that you didn't pay the slightest attention to what was going on? A. No, sir.

Q. It did not concern you? A. It did not concern me at all.

99 Q. As to the crying, it may have been fifteen minutes and it may have been half an hour? A. Yes, sir.

JOHN DALY,
By the Examiner.

RICHARD A. SCAGGS, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined—

By Mr. TOTTEN:

Q. What is your business? A. I am a carpenter.

Q. How long have you lived in Washington? A. About twenty years.

Q. Have you been present during the taking of the depositions of Mr. Freund and Mr. Daly? A. I have.

Q. Were you present at the sale which they were inquired of about? A. I was not.

Q. You were not present at the sale? A. No, sir; I was across the street from it, but I didn't go over to it at all.

Q. Where were you standing? A. I was not standing looking on even. I was at my bench, at work.

Q. In your shop? A. Yes, sir.

Q. Did you notice how many people there were there? A. Well, there didn't seem to be very many. I looked out as I would
100 at anything else that was opposite to me and I could not help but see something. I knew there was something going on.

Q. Did you hear any bidding? A. No, sir.

Q. How far were you from the auctioneer? A. I should suppose I was 150 feet.

Q. Were you at work at your bench? A. Yes, sir.

Q. Could you hear the crying of the sale? A. I didn't hear any. I don't know that I could have heard it even.

Q. Did you know anybody that was at the sale? A. I saw several men there whom I knew just after the sale was over. I knew that Mr. Daly was there and I knew that Mr. Duncanson was there, because I saw him leave there. He passed right along after the sale. Whether he was standing there during the sale or not, I could not say.

Q. Do you know whether there was any bidding? A. No, sir; I do not.

Q. Did you hear any? A. No, sir; I was too far from it.

Cross-examination.

By Mr. DAVIDGE:

Q. Where were you? A. I was in my place of business.

Q. Tell me exactly where that is. A. It is 704 9th St.

Q. That is on the west side of the street? A. Yes, sir.

Q. How many doors from the south side of G street? A. It is four doors. It is the third place. My place is a little one-
101 story frame shanty, between Freund's and the church. It is exactly opposite Mr. Daly's old place.

Q. You say you were at your bench. Where was that bench—on the inside of the house, I suppose? A. Yes, sir; my bench was on the inside of the house, facing the door.

Q. You were at work at your bench? A. Yes, sir.
Q. The sale did not concern you? A. Not at all.
Q. You paid no attention to it? A. Not at all.

Redirect examination.

By Mr. TOTTEN:

Q. I forgot to ask you one question. Did you have any conversation with members of that company that you saw there about this sale at the time? A. I did not converse with them. I simply heard some remarks that were made after the sale.

Q. Were they by people who were in the crowd? A. I do not really know whether they were in the crowd or not, because the crowd dispersed just as I walked over across the street.

Q. Then, you did go across the street after the sale? A. If there was any crowd it was all gone before I got there, or the body of it, at any rate.

Q. What were the remarks that you heard?

Mr. DAVIDGE: I object to the question as hearsay.

A. There were several persons talking, and they intimated that it was not a genuine sale.

Q. What did they say about it? A. I really could not re-
102 call any word that was spoken at the time, but that was the impression I was left under.

Q. Do you know of any person who said this? A. I really don't remember of any person who was present just at that time, except that Mr. Prentiss and Mr. Dailey, and probably Mr. Nairn, were there. I think Mr. Nairn and Mr. Dailey were close to us at the time that was going on. I think he either passed along or was standing at about Mr. Dailey's place when this remark was made; that it was only—I think Mr. Prentiss was the man who was doing the principal talking at the time.

Q. Wasn't he the man who made that remark? A. I think he was. I won't be sure about it.

Q. What Mr. Prentiss was that? A. I don't know his name at all. He was an old gentleman that lived in one of those large houses, and he used at one time to give orders for work on the property. I have done a good deal of work for him in repairing.

Q. Where is he now? A. He is dead.

Q. Did you hear anybody else say anything of that sort? A. No, sir; I did not hear anybody else say anything of that sort.

Q. How long did the crying continue? A. I haven't the slightest idea.

Recross-examination.

By Mr. DAVIDGE:

Q. I understand that you did not even understand what was said by this party? A. No, sir. I took no interest in it at all.

Q. He was not talking to you? A. Not to me at all.

103 Q. He was talking to somebody else? A. Yes, sir.

Q. You don't know to whom he was talking? A. No, sir.

Q. You happened to be near enough to hear something that made an impression on your mind that he was talking about the sale not being genuine? A. There were three or four gentlemen talking. Of course, they all had something to say, and I heard what they said.

Q. You don't know whether they had been at the sale? A. No, sir; I do not.

Q. How long after the sale was it that you went there? A. It could not have been more than five minutes. The crowd had not gone away entirely; there were still a few people around. I went across to find out what it had sold for, but I couldn't say now what it did sell for.

Q. You have even forgotten that? A. Yes, sir.

Q. You did hear at the time what the property brought, did you not? A. I have no recollection of hearing. If I heard the figures, I don't remember them now.

R. A. SCAGGS.

Subscribed and sworn to before me this 9th day of July, 1891.

WM. HERBERT SMITH, *Examiner.*

It is hereby stipulated by and between counsel for the respective parties that Thomas J. Fisher, the auctioneer who personally
104 cried this sale, is now dead, and has been dead for about three years.

The further taking of these depositions was thereupon adjourned until Tuesday, July 14, 1891, at 2 o'clock p. m.

WASHINGTON, D. C., *July* 14, 1891—2 o'clock p. m.

Met pursuant to adjournment.

Present on behalf of the complainant, Mr. Totten; present on behalf of the defendant-, Mr. Davidge and Mr. Mussey.

Whereupon WILLIAM M. SMITH, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined—

By Mr. TOTTEN:

Q. What is your occupation and what has it been for the last fifteen years? A. I have been engaged in the real-estate business.

Q. Where? A. Partly on the corner of 9th and F streets, in the city of Washington. At present I am located at 1407 F St. N. W., in this city.

Q. Are you acquainted with the property on the corner of 9th and G streets, the northeast corner of square 405, which was the property of Mrs. Hitz? A. I am.

105 Q. Did you ever have anything to do with it? A. We rented it—that is, we collected the rents for it.

Q. For how long a period of time? A. I cannot tell you exactly, but for several years.

Q. Who do you mean by "we"? A. I mean John Sherman & Company. I was with John Sherman.

Q. Did you collect the rents up to the time Mr. Keyser took possession? A. I did, sir.

Q. Did you for any time after that? A. I think we did.

Q. Did you collect the rents until Mr. Tyler got possession? A. Yes, sir.

Q. After that you had nothing further to do with that property? A. No, sir.

Q. How long have you been dealing with real estate—buying and selling it—in this city? A. For about fifteen years.

Q. Have you ever had any experience as an auctioneer of real estate? A. I have.

Q. How long were you engaged in that kind of business? A. I made all the marshal's sales here in the District for about five years that related to real estate. I should say for eight or ten years I have been engaged in that business. I cannot tell you exactly.

Q. Did you ever sell any property that was mortgaged to the Freedman's bank under deed of trust? A. I did, sir.

106 Q. Did you make many such sales? A. Yes, sir.

Q. How much was the property that I speak of, on the corner of 9th and F streets, worth on the 26th day of March, 1884, in your opinion? There are nearly 8,200 square feet of ground in the whole property belonging to Mrs. Hitz. A. My opinion is that that property on the northeast corner of 9th and G streets that we had in charge was worth $8 per foot in March, 1884. We discontinued renting the property in December, 1883. It was taken out of our hands.

Q. I asked your opinion about it in reference to the date of March, 1884. A. My impression is and my opinion is that the property was worth $8 a foot or more.

Q. In its then condition—do you mean as it was then improved? A. If the property had been in better condition—the buildings—of course, the income would have been greater. I am speaking of what I consider the worth of the property as it was.

Cross-examination.

By Mr. DAVIDGE:

Q. Were you a partner of John Sherman's? A. I was not. I was a clerk of John Sherman's. The real-estate department was placed by John Sherman exclusively in my care.

Q. Have you bought or sold any real estate on your own
107 account? A. Not on my own account. My transactions have been for the firm.

Q. For what marshal did you make sales for five years? A. I cannot tell you. I have been called by this present marshal to make appraisals of real estate for sale. I made sales for Frederick Douglas, I think, while he was marshal.

Q. Did you sell, whilst auctioneer, for the marshal? A. Yes, sir.

Q. Did you sell, whilst auctioneer, for the marshal or for anybody else, any real estate in the locality in question? A. I don't think I could answer that without making a reference to the books.

Q. You cannot say, then, at present, that as auctioneer for the marshal or anybody else you ever made a sale of any property in the locality in question? A. I don't think I can answer that without referring to my office book.

Q. You don't know? A. No, sir.

Q. As clerk for John Sherman & Company did you ever buy or sell any property in the locality in question? A. I don't remember.

Q. You have said that you neither bought nor sold property on your own account? A. No, sir; not on my own account.

Q. Are you acquainted with any sale of property in that locality on or about the 26th of March, 1884? A. I am not.

Q. Are you acquainted with a sale of any property in that
108 locality within a period of ten years prior or subsequent to March 26th, 1884? A. Not that I remember.

Q. You have said that your impression is that the value of the property was $8 a foot. Will you tell me upon what you base that opinion or impression? A. In the first place the property is substantially located on the corner. It commands that square at 9th and G streets and is the key to that square on that side for valuation, as I look upon it.

Q. Anything else? A. Only from its general situation.

Q. Anything else? A. I don't know that there is.

Q. How does what you have stated enable you to fix the valuation of the property at $8 a foot? A. Well, in taking the situation of the property at that time, as I refer back, I should presume, and it is my opinion, that it was worth $8 a foot or more.

Q. Why, as you have no data, $8 a foot rather than any other amount? A. My opinion would be worthless without I could put a data upon something.

Q. I do not exactly understand you. A. Suppose I should say that my opinion would be $5 a foot. I should not be satisfied in my own mind that that was a proper answer to your question. In order to get a valuation that I can reconcile my mind to, my opinion is that it would be worth $8 a foot or more.

Q. Then you fix the amount in order to reconcile yourself to the opinion expressed? A. If my opinion is worth anything I base it upon that.

109 Q. Property in any locality is worth what it will bring, is it not? A. Sometimes it is and sometimes it is not.

Q. Do you know any better test of the value than the current rates brought at public and private sales by property in a particular locality? A. Let me understand that question further.

Q. Do you know any better test of value than the current rates brought at public and private sales by property in a particular locality? A. Property, oftentimes, at public sales and at peremptory sales, would be subject to a less value than it is intrinsically worth.

Q. How about private sales? A. Private sales have a better

opportunity, in my opinion, of getting at a fair valuation of the property.

Q. Would not public and private sales together constitute the fair valuation? A. I should have to separate that, according to my last answer, because I cannot answer it fairly.

Q. Then, in your opinion, property may be worth a great deal more than it will bring at either public or private sale? A. I think so. I think if you force a sale at either public or private sale that you do not arrive at its true valuation.

Q. How would you arrive at the true valuation of property except by determining what people are willing to give for it? A. Well, that is one thing; but suppose that people were not willing
110 to give what, in your estimation, the property is worth; there is a lack of valuation.

Q. Then your opinion is that sales are not a means of determining values, but that valuation depends upon something behind and independent of the sale? A. Not exactly that.

Q. Then what do you mean? A. I mean that if a piece of property is put up at public sale and forced, at a peremptory sale, and sold under those circumstances, it does not, in my opinion, often bring its true value.

Q. Do you know any one who would have given $8 a foot for this property? A. I do not.

Q. Did you know any one who would have given $4 a foot for this property? A. No; I did not.

Q. Did you ever hear the value of this property discussed at or about the time of the sale? A. I don't think I ever did.

Q. Then what you say as to valuation is a mere speculation or conjecture, is it not? A. It is just what you asked me about—my opinion.

Q. That is speculation or conjecture? A. No; it is my positive opinion.

Q. Have you any reason to believe that there is a man in the District of Columbia who shares in that opinion with you? A. No, sir; I came here without having a word of conversation with any living being about its value.

Q. You say you have not talked to anybody lately in respect to the value of this property? A. I don't think I have.
111 Q. Who asked you to appear here? A. Mr. Totten asked me to appear here and to state what, in my opinion, was the value of that property in 1884.

Q. Did anybody else speak to you on the subject? A. No, sir.

Q. Are you sure? A. I think I am sure.

Q. Reflect. —. I do not know of any one that I have spoken to. I know I have not.

WILLIAM W. SMITH,
By the Examiner.

EDWIN A. MCINTIRE, a witness of lawful age, called by and on behalf of the complainant, having been first sworn, is examined—

By Mr. TOTTEN:

Q. What is your full name? A. Edwin A. McIntire.

Q. Have you ever been engaged in the city of Washington in the real-estate business to any extent? A. I have for a number of years past.

Q. For how many years? A. About twenty-five years.

Q. Are you acquainted with the property at the northeast corner of 9th and G streets, which formerly belonged to Mrs. Hitz? A. I know that property.

Q. How is it situated in reference to the United States Interior Department, or the Patent Office, as it is called? A. It is directly across the street, on the north side of G street.

112 Q. How much was that property, in your judgment, worth on the 26th of March, 1884? A. I should say the ground at the corner was worth $5 a foot.

Q. At that time? A. Yes, sir.

Q. Would that be exclusive of the improvements? A. Yes, sir.

Q. How much was it worth as it stood in 1884, with the improvements on it? A. I would not be able to say that accurately without an examination of the houses. I never did make an examination of them, but I should say that if the backs of the houses are similar to the fronts—that is, if they would bear a comparison with the front—the property ought to be worth at least $50,000. I have never been inside any of the houses, and I could not say as to the rear portion of them. I make that estimate only by looking at the front.

Q. Have you been acquainted with the property long? A. I have known it for quite a number of years.

Q. Did you see it in 1884? A. Yes, sir; and long before that.

Q. Do you remember a sale which took place there in 1884 on the 26th of March or about that time? A. I remember a sale taking place there, but I could not fix the date. It has been about that long ago.

Q. Were you there? A. Yes, sir; I was.

Q. How did you come to go there—for the purpose of purchasing or as a spectator? A. I went to bid on the property.

113 Q. You wished to bid on it? A. Yes, sir.

Q. Did you bid? A. No, sir.

Q. Why not? A. I understood the property was being managed for the benefit of Mrs. Hitz.

Q. You understood what? A. That the sale was being managed for the benefit of Mrs. Hitz.

Q. Where did you gain that information and how? A. Stephen Prentiss either told that, or I gained that impression from his conversation with me. I mean old Prentiss who lived on the premises. I think his first name was Stephen.

Q. Did you mingle in the crowd at the sale? A. Yes; I was there on the sidewalk.

Q. How many people were there in attendance upon that sale—business men, for instance? A. That I could not say. There was nothing that impressed me or would make me recollect that.

Q. Did you hear any bids made? A. That I could not say after this lapse of time. I noticed nothing unusual in the sale except the statement that was made to me by Mr. Prentiss, and I thought it was his friends who were bidding, or Mrs. Hitz' friends who were bidding.

Q. Can you give us an idea how many bids were made in all? A. No; that I could not say.

Q. How long did the crying of the sale continue? —. I
114 could not say that. I noticed nothing unusual about that. I judge it was about the usual time.

Q. Did you know anybody present at the sale? A. That I cannot recollect now. I have no doubt that I did know a number, but I do not recollect them now.

Q. Did you hear anything said by anybody at the sale about the property being involved in litigation; and, if so, who said it? A. I have just an indistinct recollection that something of that kind was said to me by Mr. Prentiss; but what it was I cannot now call to mind.

Mr. DAVIDGE: The declaration- of Mr. Prentiss to the witness are objected to as hearsay.

By Mr. TOTTEN:

Q. Was this Mr. Prentice the kinsman of Dr. Prentice, who was the cashier of the German-American national bank? A. He was the father of Dr. Prentice.

Q. Did you hear anybody else say anything about litigation in connection with the property? A. I do not remember of talking with anybody else except Mr. Prentice.

Q. Was that the only reason you did not bid upon the property? A. I imagine so. That would have been sufficient.

Q. That would have been sufficient to deter you? A. Yes, sir.

Cross-examination.

By Mr. DAVIDGE:

Q. Mr. Stephen Prentice is dead, is he not? A. I heard a day or two ago that he was dead. I did not know it until then.

115 Q. Did you know Mrs. Hitz? A. No, sir; I would not know her if I should see her. I do not remember ever to have seen her. I knew Mr. Hitz very well.

Q. You say the corner, in your opinion, was worth $5 a foot? A. Yes, sir.

Mr. TOTTEN: He did not limit it to the corner lot. He said the whole property.

The WITNESS: I take the whole property. I understand that it is all a corner lot.

By Mr. DAVIDGE:

Q. You say the ground at the corner was worth $5 a foot? A. Yes, sir.

Q. What am I to understand your valuation of the property to be—how much a foot? A. About $5 a foot. I should say it was worth that at the least calculation.

Q. And with the houses you put it at $50,000? A. About that. I am now just estimating the houses from looking at the outside, a day or two past.

Q. About the time of the sale, before and after, had you bought or sold any property in that locality? A. Not on my own account; I had not.

Q. Or on account of anybody else? A. I cannot call to mind any right now.

Q. Then you do not know of any purchase or sale of property in this neighborhood about the time of this sale, do you? A. No; I cannot say that I do. I cannot say that I can point out any

116 particular property that was sold then.

Q. What means did you possess of knowing the value of that property at that time? A. Just the same means that any real-estate broker would possess of knowing generally the value of property in different sections of the city—from the sales that take place.

Q. And nothing beyond that? A. I think that is the basis of every calculation of that kind.

Q. I asked you if you had any opportunity beyond that. A. No, sir; I think that is all. There may be some particular circumstances connected with the particular property, but you asked me in regard to this property.

Q. I asked you in regard to this property and what special means of knowledge you had of arriving at a fair value of this property at or about the time of the sale. A. I base my estimate upon the general valuation of property in the city.

Q. And that is all? A. Yes, sir.

Q. Have you ever known property in that neighborhood on G street, at or about the time of the sale, bringing as much as $5 a foot? A. No; I cannot say that I know of any sale on G street. I remember sales made on F street, but at a higher rate than that.

Q. F street and G street were very different streets at that time, were they not? A. Yes, sir; but the corner of 9th and G streets would compare with other locations. The corner is worth more than inside lots.

117 Q. You think it was? A. Yes, sir.

Q. Have you any knowledge of any sale whatever on G St. between 7th and 10th streets, we will say at or about the time of this sale? A. No; I cannot say that I have.

Q. And yet sales were made, were they not? A. They might have been. I don't know. I might have known something about them then, but I do *do* not recollect them now.

Q. Do you know, except in the general way you have mentioned, of the value of property on 9th street between G and H or on the

west side of 9th street between G and F? A. I cannot recall now any sale that I had or that I was interested in along there at that time.

Q. Or that you knew about? A. I cannot recall any now.

Q. Then is your opinion anything better than a mere speculation or conjecture based upon your general knowledge of city values? A. It is based upon my general knowledge.

Q. Of city values? A. Yes, sir; I have not had sales up there now for ten or fifteen years; yet I think myself qualified to state what the property is worth.

Q. At this time you know perfectly well that property on G street has been the subject of great speculation and of universal discussion, do you not? A. Yes, sir; but I cannot say that I know of any sale right in that immediate vicinity.

118 Q. I did not ask you about that immediate vicinity. I speak of that neighborhood. A. That is what I mean when I say in the immediate vicinity. I mean that neighborhood.

Q. You say that there was nothing unusual at the sale? A. I cannot recall anything now. In fact I had forgotten all about it until my attention was called to it.

Q. Who called your attention to it? A. Mr. Taylor.

Q. Which Mr. Taylor? A. This Mr. Taylor sitting here (indicating).

Q. What is his first name? A. He can tell better than I can.

Mr. TAYLOR: Mr. George Taylor.

By Mr. DAVIDGE:

Q. Did Taylor come to see you? A. Yes, sir; I think his first visit was a month or six weeks ago, or maybe longer than that.

Q. Did he discuss the subject of value with you? A. He told me he understood I was present at that sale. I told him that I was, and I told him I didn't want to be called as a witness. I told — he had better see Mr. Prentice and get him to tell him all about it. I knew nothing about Mr. Prentice being dead until he told me that he was dead.

Q. Did you discuss the value of the property with Taylor? A. Taylor showed me a plat of the property and asked me what I thought it was worth. The plat showed two lots, and I told him I would look upon that as one lot, and I would put a value on one lot and call it all the corner.

119 Q. That was done about a month ago? A. I am not certain about that part being a month ago, because he called upon me several times. I think that was done about a week or ten days ago.

Q. I suppose when Mr. Taylor called, you had pretty much forgotten this sale that took place six years before, had you not? A. Yes, sir; I had.

Q. And in order to revive any memory you might have, you had to make an effort, did you not? A. I recollected the sale, but I had forgotten the circumstances of the sale.

Q. Values now on that street are very different from what they were six years ago? A. Yes, sir.

Q. A perfect revolution in values at that point, is there not? A. Yes, sir.

EDWIN A. McINTIRE.

Subscribed and sworn to before me this 14th day of July, 1891.

WM. HERBERT SMITH,
Examiner in Chancery.

Mr. TOTTEN: I now offer in evidence papers and files in a cause in the supreme court of the District of Columbia wherein Benjamin U. Keyser, receiver, was complainant and John Hitz and William P. Jenks and others were defendants, which cause was and is known as equity cause No. 6583.

I offer in evidence also the following papers:

120 1st. The original bill filed by Keyser, together with Exhibit H filed with said bill. Exhibit H is the advertisement of the sale by Richard W. Tyler, trustee, under the same deed of trust now in question, and the sale so advertised was the one which was sought to be enjoined by the original bill of Keyser in that cause.

(Said papers are filed herewith, marked "Complainant's Exhibit No. 1" and "Complainant's Exhibit No. 2," respectively.)

2nd. The original restraining order signed by Mr. Justice McArthur.

(Said paper is filed herewith, marked "Complainant's Exhibit No. 3.")

3rd. The order continuing the restraining order in force until the hearing, also made by Mr. Justice McArthur.

(Said paper is filed herewith, marked "Complainant's Exhibit No. 4.")

4th. Separate answer of Jane C. Hitz to the original bill.

(Said paper is filed herewith, marked "Complainant's Exhibit No. 5.")

5th. Separate answer of Richard W. Tyler, together with three exhibits, viz., Exhibit R. W. T. No. 1 with said answer, and a letter to him from Keyser and another from Mr. Jenks for a direction of sale.

(Said papers are filed herewith, marked "Complainant's Exhibit No. 6," "Complainant's Exhibit No. 7," "Complainant's Exhibit No. 8," and "Complainant's Exhibit No. 9," respectively.)

6th. The cross-bill of Jane C. Hitz.

(Said paper is filed herewith, marked "Complainant's Exhibit No. 10.")

7th. An amendment to her cross-bill.

(Said paper is filed herewith, marked "Complainant's Exhibit No. 11.")

8th. Separate answer of William P. Jenks.

121 (Said paper is filed herewith, marked "Complainant's Exhibit No. 12.")

9th. The decree of the special term, made by Mr. Justice Wylie.

(Said paper is filed herewith, marked "Complainant's Exhibit No. 13.")

10th. The order of December 15th, 1881, signed by Mr. Justice Wylie, modifying his decree in reference to the possession.

(Said paper is filed herewith, marked "Complainant's Exhibit No. 14.")

11th. The bond filed by Keyser in pursuance of the order of December 15th, 1881, and also a letter of Knox relating to his authority to sign that bond.

(Said papers are filed herewith, marked "Complainant's Exhibit No. 15" and "Complainant's Exhibit No. 16," respectively.)

12th. A decree of the court in general term of December 11th, 1883.

(Said paper is filed herewith, marked "Complainant's Exhibit No. 17.")

13th. A supersedeas bond and approval thereof on the appeal of Mrs. Hitz.

(Said paper is filed herewith, marked "Complainant's Exhibit No. 18.")

14th. A reference to the auditor to state the accounts of Keyser, and his report thereon.

(Said papers are filed herewith, marked "Complainant's Exhibit No. 19" and "Complainant's Exhibit No. 20," respectively.)

15th. A decree of the court in general term upon the exceptions filed to the auditor's report.

(Said paper is filed herewith, marked "Complainant's Exhibit No. 21.")

16th. The deed of Jane C. Hitz and husband to Sarah L. Crane.

122 (Said paper is filed herewith, marked "Complainant's Exhibit No. 22.")

17th. The deed from Sarah L. Crane to Richard W. Tyler, trustee.

(Said paper is filed herewith, marked "Complainant's Exhibit No. 23.")

18th. The deed from John Hitz and Jane C. Hitz to Enoch Totten.

(Said paper is filed herewith, marked "Complainant's Exhibit No. 24.")

19th. The deed from Richard W. Tyler, trustee, to Seth Caldwell.

(Said paper is filed herewith, marked "Complainant's Exhibit No. 25.")

20th. The deed from Seth Caldwell and wife to William P. Jenks.

(Said paper is filed herewith, marked "Complainant's Exhibit No. 26.")

21st. The report of Richard W. Tyler, as receiver, filed with the auditor of the court, dated July 31st, 1885, together with the report of the auditor, stating the account of Tyler as receiver, filed August 4th, 1885.

(Said papers are filed herewith, marked "Complainant's Exhibit No. 27" and "Complainant's Exhibit No. 28," respectively.)

22nd. A certified copy of the docket entries in equity cause No. 6583.

(Said paper is filed herewith, marked "Complainant's Exhibit No. 29.")

23rd. A certificate of the clerk of the Supreme Court of the United States, showing when the first appeal of Jane C. Hitz was filed and docketed in the Supreme Court of the United States, and a similar certificate as to her second appeal to the Supreme Court of the United States.

123 (Said papers are filed herewith, marked "Complainant's Exhibit No. 30" and "Complainant's Exhibit No. 31," respectively.)

24th. A copy of each of the mandates filed in the said cause.

(Said papers are filed herewith, marked "Complainant's Exhibit No. 32" and "Complainant's Exhibit No. 33," respectively.)

25th. Copy of proceedings before special auditor as to distribution of costs and order confirming the same.

(Said paper is filed herewith, marked "Complainant's Exhibit No. 34.")

Mr. DAVIDGE: The foregoing documentary evidence is objected to as not giving a complete record history of the matters in question, but will be supplemented in its omissions by the defendant-.

(The further taking of these depositions was thereupon adjourned until Tuesday, July 21, 1891, at 1 o'clock p. m.)

124 WASHINGTON, D. C., *July* 21, 1891—1 o'clock p. m.

Met pursuant to adjournment.

Present on behalf of the complainant, Mr. Totten; present on behalf of the defendant-, Mr. Davidge and Mr. Mussey.

Whereupon TYRUS C. DICKINSON, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined—

By Mr. TOTTEN:

Q. Please state your name, residence, and occupation. A. My name is Tyrus C. Dickinson; my place of business is 1339 F street N. W.; I am in the real-estate business.

Q. How long have you lived in Washington? A. Since 1866.

Q. What business have you been engaged in for the last fifteen years? A. For a part of that time I was chief of a division in the Treasury Department. During the latter part of that period, for seven or eight years, I have been engaged in the real-estate business.

Q. Are you still engaged in the real-estate business? A. Yes, sir.

Q. Are you acquainted with the property on the northeast corner of 9th and G streets? A. I am very well acquainted with it.

Q. How much was that property worth at a fair valuation in March, 1884, in your opinion? A. I should think it was worth in the neighborhood of $8 a square foot.

125 Cross-examination.

By Mr. DAVIDGE:

Q. In March, 1884, had you left your place in the Treasury Department? A. No, sir; not then.

Q. You were not then engaged in the real-estate business? A. No, sir; not at that time. I was engaged in the real-estate business in connection with my duties at the office.

Q. How long after that did you enter the business of dealing in real estate? A. In 1885.

Q. At what time in 1885? A. In the early part of June or the latter part of May, 1885.

Q. Do you base your estimate of $8 per square foot upon any sale of property actually made? A. I made no sale.

Q. Did you make any purchase of property on G street in the neighborhood of the property in question, or on 9th street in that neighborhood? A. No, sir.

Q. Are you acquainted with any negotiations in respect of the purchase of sale of property that could form the basis of the opinion expressed by you? A. Only the property purchased by Mr. McLean and Mr. Baker; one on the corner of New York avenue and 9th street and the other almost opposite it—a little below.

Q. These two transactions are the basis of the opinion expressed by you? A. They are not entirely the basis of my opinion.

Q. What beyond that? A. I made a great many inquiries
126 as to the value of real estate after I went out of the office in 1885, for the purpose of getting control of it for sale.

Q. You were not inquiring about the price of property in 1884, were you? A. No, sir; not in 1884. I was principally in 1885.

Q. In 1885 you ascertained the prices of property, did you not? A. Yes, sir.

Q. You had no occasion to ascertain the price of property before that? A. Before that I was engaged in the real-estate business a good deal—making inquiries a good deal, making inquiries about property, but not specially on 9th street.

Q. Can you recollect any inquiry made in relation to this property or property in that neighborhood? A. I made a good many in the year 1884.

Q. I speak of your knowledge at that time. A. Not at that time.

Q. When did you make inquiries recently in order to testify in this case? A. I have made some inquiries recently.

Q. In order to testify? A. Yes, sir; I believe so—to testify in this case.

Q. Whom did you ask about it? A. I have consulted my court records more than anything else.

Q. You mean the record of transfers, do you not? A. Yes, sir.

Q. Do you mean to tell me that transfers of property on G street or 9th street at or about the time of this sale, shortly before or shortly afterward, afford any foundation for your opinion
127 that the property was worth $8 per square foot? A. I think they form a fair basis for the opinion.

Q. Give me the transfers to which you refer. A. I cannot do that without looking at my court record and giving the numbers of the lots and the sales.

Q. How many are there? A. There are quite a number on G street.

Q. At or about this time, in 1884—I must trouble you to look at those transfers, for I want to know just what is the foundation of your opinion that the property is worth $8 per square foot. A. I will do that.

Q. Can you do that now? A. No, sir. It would, perhaps, take an afternoon.

Q. Can you tell me when the purchases at the corner of New York avenue and 9th street and on the opposite corner were made by McLean? A. Mr. McLean did not buy on the opposite corner.

Q. Who did buy? A. Henry M. Baker.

Q. When did they make their purchases? A. I think Mr. McLean bought about five or six years ago.

Q. That was some time after 1884, was it not? A. I suppose it was, but it was not much after that time.

Q. When did Baker buy? A. He bought four or five years ago.

Q. He bought after 1884. You don't know anybody who bought at or about the time of this sale, do you? A. No, sir.

128 Q. When we meet again you will give me the transfers to which you refer and upon which you base your opinion? A. I will do that.

Q. You said you made some inquiries about the values of real estate at the time of this sale in order to testify upon the subject. At whose instance did you make those inquiries? A. At the instance of Mr. Taylor.

Q. What Mr. Taylor? A. George Taylor.

Q. What did Taylor say to you—that he took no interest in the pending case and wanted the benefit of your testimony? A. He asked my judgment as to the value of the property.

Mr. DAVIDGE: The foregoing evidence of the witness, so far as based in any degree upon inquiries made in order to give testimony in the present case and at the instance of George Taylor, is objected to.

TYRUS C. DICKINSON,
By the Examiner.

THOMAS J. MYERS, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined—

By Mr. TOTTEN:

Q. How long have you lived in Washington? A. I came here in 1848.

Q. How long have you been engaged in the real-estate business here? A. Since 1876.

Q. Are you engaged in that business now? A. I am.

129 Q. Are you acquainted with the property on the northeast corner of 9th and G streets? A. Yes, sir.

Q. Known as the Hitz *property*? A. *I am.*

Q. Did you know it in 1884, in the month of March? A. Yes, sir.

Q. Were you well acquainted with it and familiar with it? A. Yes; I was.

Q. What was it worth, in your opinion, in March, 1884, including the improvements? A. I would eliminate the improvements if I were to value the property. If I were buying that property I would consider the property as worth little or nothing beyond the value of the land without the improvements upon it. As a paying property I would value it at about $6 per foot, improvements and all, and maybe a little over.

Cross-examination.

By Mr. DAVIDGE:

Q. Did George Taylor talk to you about your testimony in this case? A. No, sir; I don't know Mr. George Taylor.

Q. Can you recall any actual sale of property in that neighborhood upon which you base your opinion as to the value of the property at or about the time of March, 1884? A. I have no data upon which to base the statement I made further than memory. As near as I can get at it, in 1884 the property at the corner of New York avenue and 9th street was for sale. I had it for sale. I had it on my books, and the price was at that time about $7 a foot.

130 Q. Did you sell it at that price? A. No; I did not. I had it on my books at that price. I think when I first got it there was a slight defect in the title, which was afterwards cured.

Q. That was the price which the owner of the property who wanted to sell put upon it? A. I understood that he got that price afterwards.

Mr. DAVIDGE: The understanding of the witness is objected to.

By Mr. DAVIDGE:

Q. You don't know that to be a fact? A. I am not sure of the fact. I didn't see the money pass.

Q. You have no personal knowledge of it? A. No, sir.

Q. Then I understand that with that exception you know of no sale on which you can base your opinion; and you cannot give, as you have already stated, any data for it? A. There was a piece of property about that time that I had for sale on 9th street, which was afterwards sold for about $10,000. It was in the middle of the square, and not a corner lot, on the square above. The owner informed me that he got $10,000 for it.

Mr. DAVIDGE: The information of the witness is objected to as incompetent and immaterial.

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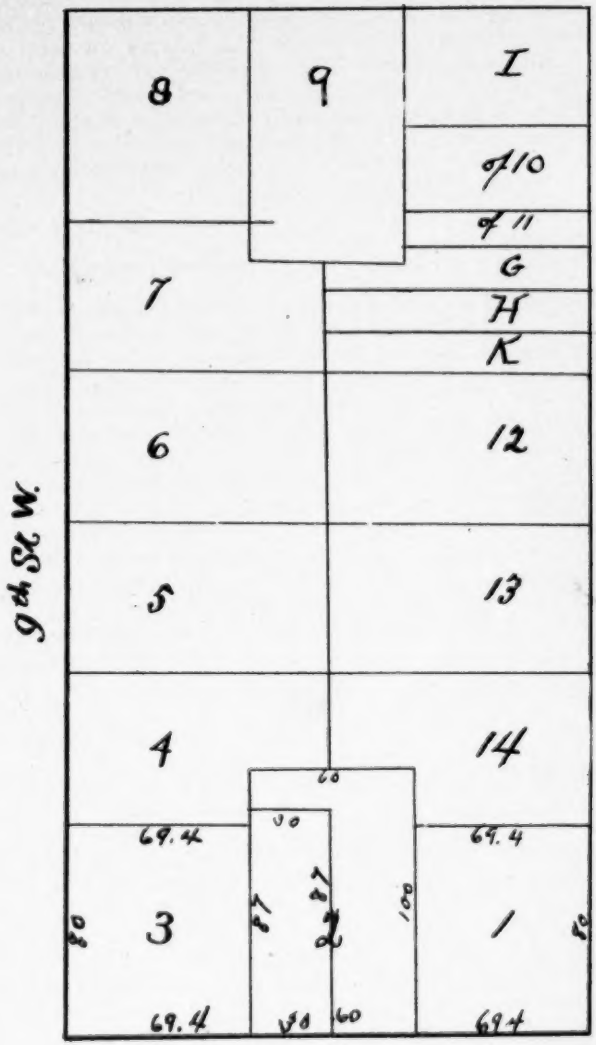
Sqr 405

North H St.



North G St.

By Mr. DAVIDGE:

Q. What were the dimensions of that lot? A. The dimensions were about 20 by 90.

Q. That is about $5 a foot? A. It was about the middle of the square.

131 Mr. TOTTEN: Was it $5 a foot?

A. About $5 a foot, but not quite. That, however, was in the middle of the square. Property on the corner would be worth from 25 to 30 per cent. more.

By Mr. DAVIDGE:

Q. These are the only two transactions that you know or have heard of upon which you base your estimate as to the value of this property? A. They are; except my general knowledge of the value of property around the city of Washington.

Redirect examination.

By Mr. TOTTEN:

Q. Who was the owner of the property on the corner of 9th and New York avenue? A. I forget his name. He was a shoemaker.

Q. Do you know who finally bought it? A. I think Mr. McLean bought it.

Q. Did you regard that property on the corner of New York avenue and 9th street as being as valuable as the property on the corner of 9th and G?

Mr. DAVIDGE: The opinion of the witness on this subject is objected to as incompetent and immaterial.

A. I do; from the fact that there is no waste ground there.

Q. Where? A. At the corner of 9th and New York avenue.

Q. Is there any waste ground at the corner of 9th and G streets? A. I really do not know that there would be. I don't know the dimensions of that lot exactly.

132 Q. Suppose that property runs 80 feet on 9th street by 99 feet 4 inches on G street, with a small projection on the east of 30 feet. I show you a plat with this property designated by red lines. The corner lot, No. 3, is 80 feet by 69.4, and the next lot is 30 feet wide and 87 feet long. That is the lot now in controversy. What do you say about it? A. I should consider that there was no waste ground there.

Mr. TOTTEN: I now offer in evidence the plat of square 405, showing the lot in controversy, indicated by red lines.

The above-mentioned plat is filed herewith, marked Exhibit W. H. S. No. 1.

(Here follows plat marked p. 133.)

134 By Mr. TOTTEN:

Q. I want your opinion, now, as to the comparative value of these two pieces of property. A. I should think one was as valuable as the other.

Q. You do not know of your own knowledge how much Mr. McLean paid for the property at 9th and New York avenue? A. I do not. The price that it was held at by the owner when I had the property in my hands for sale was about $7 per foot. I have understood it was sold for that price.

By Mr. DAVIDGE:

Q. That is the price put upon it by the owner? A. Yes, sir; and I understood it was sold for about that.

THOMAS J. MYERS,
By the Examiner.

Subscribed and sworn to before me this — day of ——, 1891.

——— ———,
Examiner in Chancery.

Adjourned.

135 In the Supreme Court of the District of Columbia.

JANE C. HITZ
vs.
JOHN STORY JENKS ET AL. } Equity. No. —.

WASHINGTON, D. C., *March* 5, 1892—2 o'clock p. m.

Met, pursuant to agreement, at the office of Enoch Totten, Esq.

Present on behalf of the complainant, Mr. Totten; present on behalf of the defendants, Mr. Davidge and Mr. Mussey.

Whereupon JANE C. HITZ, a witness of lawful age, called by and in her own behalf, having been first duly sworn, is examined—

By Mr. TOTTEN:

Q. Where were you born? A. I was born in Washington, D. C.

Q. When? A. On March 28, 1837.

Q. Where have you lived during your life? A. I have lived 44 years in Washington and 4 years in Leesburgh, Virginia.

Q. What was your father's name? A. Michael Shanks.

Q. How long did he live here in Washington? A. He lived here all his life. He was over 70 when he died; between 70 and 80—I do not know exactly which—but he had always lived here.

136 Q. Do you remember the date of his death? A. I do not remember the date. He died in May, 1864.

Q. What was your mother's name? A. Catherine N. Waters.

Q. Afterwards? A. Afterwards Shanks.

Q. When and where did she die? A. She died in Washington, on January 26th, 1879.

Q. When were you married? A. On August 5, 1856.
Q. What was your husband's name? A. John Hitz.
Q. Is he now living? A. He is.
Q. Where does he reside? A. In Washington.
Q. How long has it been since you and your husband ceased to live together? A. About eleven years.
Q. How many children have you had? A. I have had five children.
Q. What were their names and what was the date of the birth of each? A. Kate Johanna, born June 9, 1857; Anna Gertrude, born May 29, 1861; Agnes, born November 17, 1863; Pauline, born October 3, 1870, and William Henry, born April 21, 1872.
Q. These were all children by this marriage? A. Yes, sir.
Q. How many of the children and which ones are now living?
A. Two are now living—Anna Gertrude, aged 31, and *and*
137 William Henry, aged 20.
Q. Are you acquainted with the property which is in dispute in this action on the northeast corner of G and Ninth streets? A. I am acquainted with it.
Q. There is a deed on record, Mrs. Hitz, which appears to be from you and your husband to Sarah L. Crane, dated some time about June 16, 1877. What do you know about that deed, if anything?

Mr. DAVIDGE: Question objected to as *res adjudicata* and as irrelevant and incompetent.

A. Well, I never received any consideration for the deed, and I never heard of its existence until shortly after the failure of the German-American national bank.
Q. Do you know when that bank failed? A. It failed October 30, 1878.

Mr. DAVIDGE: Question and answer objected to as *res adjudicata* and as irrelevant and incompetent.

Q. Do you know how and in what way she was related to Mr. Prentiss, cashier of the German-American national bank, if at all?

Mr. DAVIDGE: Objected to as *res adjudicata* and as irrelevant and incompetent. I object to all evidence touching matters that have entered into the prior adjudication.

A. She was his sister-in-law.
Q. There is a deed from Sarah L. Crane to Richard W. Tyler, which is dated the 18th of June, 1877. When did you first obtain any information or any knowledge about that?

Mr. DAVIDGE: Question objected to as *res adjudicata* and as irrelevant and incompetent.

138 A. I obtained knowledge of that at the same time that I did of the first deed.

Mr. DAVIDGE: Answer also objected to as *res adjudicata* and as irrelevant and incompetent.

Q. Did you ever have any information or knowledge about it before the failure of the bank? A. No, sir.

Mr. DAVIDGE: Question objected to as *res adjudicata* and as leading, irrelevant, and incompetent.

Q. Did you ever consent to either of those deeds which have been last mentioned? A. I never did.

Mr. DAVIDGE: Objected to as *res adjudicata* and as irrelevant, incompetent, and leading.

Q. When was the German-American savings bank organized, or about when? A. In January, 1872.

Mr. DAVIDGE: Objected to as *res adjudicata* and as irrelevant and incompetent.

Q. Can you give the date when it was converted into a national bank? A. About May 14, 1877.

Mr. DAVIDGE: Objected to as *res adjudicata* and as irrelevant and incompetent.

Q. When that bank failed who was appointed receiver of it, if you know? A. Mr. B. U. Keyser.

Mr. DAVIDGE: Objected to as *res adjudicata* and as irrelevant and incompetent.

Q. Who was the president of the savings bank and who was president of the German-American national bank? A. John Hitz was president of them both.

139 Mr. DAVIDGE: Objected to as *res adjudicata* and as irrelevant and incompetent.

Q. Who was cashier of both banks? A. Charles E. Prentiss.

Mr. DAVIDGE: Objected to as *res adjudicata* and as irrelevant and incompetent.

Q. Can you state about when Mr. Keyser took possession of this property that we are talking about, on the northeast corner of Ninth and G streets? He took possession of it as receiver of the bank? A. It was about December, 1878.

Mr. DAVIDGE: Objected to as *res adjudicata* and as leading, irrelevant, and incompetent.

Q. Who had possession of it when he got possession of it? Who delivered possession to him? A. Mr. Hitz, I presume.

Mr. DAVIDGE: Objected to as *res adjudicata* and as irrelevant and incompetent.

Q. Who was collecting your rents at that date? A. Mr. Hitz.

Mr. DAVIDGE: Objected to as *res adjudicata* and as irrelevant and incompetent.

Q. Did he deliver or turn over possession of the property to Keyser without your knowledge or consent?

Mr. DAVIDGE: Question objected to as *res adjudicata* and as leading, irrelevant, and incompetent.

A. It was done with my knowledge and consent, but I only consented because my counsel, Mr. Cox, informed me that I could not hold the property; that I would have to give it up eventually, and being so advised by him, I reluctantly consented.

140 Q. Have you had possession of that property since? A. I have not.

Mr. DAVIDGE: Objected to as *res adjudicata* and as irrelevant and incompetent.

Q. Do you know anything about the delivery of possession of that property to Mr. Richard W. Tyler, the defendant, by Keyser, some time in January, 1884? A. I do not.

Mr. DAVIDGE: Objected to as *res adjudicata* and as irrelevant and incompetent.

Q. Did you give any consent to it? A. I did not.

Mr. DAVIDGE: Objected to as *res adjudicata* and as irrelevant and incompetent.

Q. Did you have any knowledge of the change of possession at that time? A. None.

Mr. DAVIDGE: Objected to as *res adjudicata* and as irrelevant and immaterial and incompetent.

Q. Mr. Richard W. Tyler, the defendant, made a report as receiver to the auditor of the court some time between July 31 and August 4, 1885, and the auditor made a report upon that, stating his account, which he filed on the 4th of August, 1885. Did you have any notice of the stating of that account by the auditor? A. I did not.

141 Mr. DAVIDGE: Objected to as *res adjudicata* and as irrelevant, immaterial, and incompetent.

Q. When did you first find that he had made such a report or audit, if you know? A. If I remember rightly, I learned it about a year ago or somewhat more than a year ago.

Mr. DAVIDGE: Objected to as *res adjudicata* and as irrelevant and incompetent.

Q. What were you engaged in about that time in reference to this case? A. I was engaged in preparing the bill in this case, or the bill was being prepared, and in connection with that I heard of these circumstances. So far as I can remember, I never heard of them before.

Mr. DAVIDGE: Objected to as *res adjudicata* and as irrelevant, incompetent, and leading.

Q. Do you know Mr. Richard W. Tyler personally? A. I do not know him personally. I have met him a number of times at

examinations like this—some twelve years ago—where testimony was taken. I have no other knowledge of him.

Q. Did you have any conversations with him or any communications with him, either directly or indirectly, in 1877, in reference to the transactions with Miss Crane? A. Never.

Q. Prior to the failure of the German-American national bank, were you in the habit of attending to your business relating to your own property in this city? A. I was not.

Mr. DAVIDGE: Objected to as leading, irrelevant, and incompetent.

Q. How much property did you inherit from your
142 father—how many pieces? A. Of real estate, do you mean?
Mr. TOTTEN: Yes. A. Five, I think.

Q. Was this property that we are talking about one of them? A. It was.

Mr. DAVIDGE: Objected to as irrelevant, immaterial, and incompetent.

Q. Have you had any litigation about this business growing out of the German-American national bank? A. I have had a very lengthy litigation.

Q. How many cases has Mr. Keyser instituted against you in consequence of the embarrassments caused by the German-American national bank? A. Three cases, I think.

Mr. DAVIDGE: All of this is objected to as irrelevant, immaterial, and incompetent.

Q. Can you give the titles of them? A. One was a suit growing out of an assessment upon stock in the German-American national bank.

Q. That was instituted in this court by Keyser, as receiver, against you for assessments because you were alleged to be a stockholder to the extent of two hundred shares? A. It was. Another was the present case, concerning this 9th and G Street property, and a third was a case which was dismissed very soon. There was not much litigation about that. I am not sure that I can explain that.
143 Q. You do not mean this present case? A. No, sir; I do not.

Q. You mean the original case of Keyser *vs.* Jane C. Hitz, Jenks, and others. Is that the one you allude to? A. I presume it is.

Q. How many times was your stock suit tried before a jury?

Mr. DAVIDGE: All of this is objected to as *res adjudicata*, immaterial, and irrelevant.

A. Twice before a jury.

Q. And do you know how many times on appeal in our general term? A. Twice.

Q. How often in the Supreme Court of the United States? A. Once.

Q. When was that case finally determined?

Mr. DAVIDGE: Objected to as *res adjudicata*, immaterial, and incompetent.

A. It was settled very recently, within two or three months past; in January, I think.

Q. The case of Keyser *vs.* Hitz and Jenks and others went to the Supreme Court of the United States, did it? A. Yes, sir.

Mr. DAVIDGE: Objected to as *res adjudicata*, immaterial, and incompetent.

Q. Were you annoyed by this litigation to any extent? A. I was very seriously annoyed by it.

Mr. DAVIDGE: Objected to as *res adjudicata*, immaterial, and incompetent.

144 No cross-examination.

JANE C. HITZ.

Subscribed and sworn to before me this 5th day of March, A. D. 1892.

WM. HERBERT SMITH,
Examiner in Chancery.

W. E. BURFORD, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined—

By Mr. TOTTEN:

Q. What is your full name? A. William E. Burford.

Q. What is your business? A. I am a real-estate broker.

Q. Where? A. At 1422 New York avenue, in the Evans building.

Q. In this city? A. Yes, sir.

Q. How long have you been engaged in the business of dealing in real estate? A. Since 1875.

Q. In this city? A. Yes, sir.

Q. Do you know or are you acquainted with the property on the northeast corner of Ninth and G streets, opposite the Patent Office? A. Yes, sir.

Q. In this city? A. Yes, sir.

Q. How long has that property been under your notice?

145 A. It has been under my notice ever since I have been in business and before I was in business.

Q. Were you acquainted with it on the 26th day of March, 1884? A. Yes, sir.

Q. Are you acquainted with the value of real estate in this city? A. I think so.

Q. Were you so acquainted with it at that date? A. Yes, sir.

Q. What was the value, in your judgment, of that property on the 26th day of March, 1884? A. I should put that property at that time at a conservative valuation between six and seven dollars a square foot.

Q. How much in bulk? A. About $50,000.

Q. How much is it worth now?

Mr. DAVIDGE: I object to the question as irrelevant.

A. The property is worth $20 a foot now at a conservative valuation.

Q. Could you sell it for that? A. I think so.

Cross-examination.

By Mr. DAVIDGE:

Q. How long have you been in business? A. Nearly seventeen years.

Q. Did you ever buy or sell any property in the neighborhood of the northeast corner of Ninth and G streets? A. Yes, sir.

Q. I mean prior to the 26th day of March, 1884. A. I think it was in 1881 or 1882 that I bought from Mr. James L. Barbour Nos. 804 and 806 H street.

146 Q. But that is a square north of this property? A. Yes, sir; that is a square north, but it is pretty close to this property.

Q. It is just a square north? A. Yes, sir.

Q. You bought that, you say, in 1881 or 1882? A. Yes, sir.

Q. What did you give for it? A. I gave for that property $5,500.00, which was at the rate of between $4 and $4.50 per square foot?

Q. Was the property improved? A. Yes, sir.

Q. How? A. With two very old and dilapidated brick houses.

Q. How many feet were there in both lots? A. The two lots were about 35 by 46.

Q. Of very little depth, then? A. Yes, sir.

Q. Which is the depth? A. Forty-six feet.

Q. Of course the price per square foot is larger than if the depth had been greater? A. Necessarily so; yes, sir.

Q. Was this consideration stated in the deed to you for the property? A. Yes, sir; as near as I can remember.

Q. Correctly stated in the deed? A. As near as I can remember, that was the price. I know that was what I paid for it.

Q. It was improved, I understand, by two frame buildings?

147 A. Two old buildings, very dilapidated, and upon which I spent, I think, about twelve or fifteen hundred dollars.

Q. You never pulled them down? A. No, sir; I never pulled them down.

Q. You have rented them ever since you bought them? A. No, sir; I sold them.

Q. When did you sell them and what did you get for them? A. As near as I can remember, I sold them from about six months to a year ago, and sold them for $3,500 apiece.

Q. Can you tell me just when you sold them? A. Well, I really cannot, Mr. Davidge.

Q. To whom did you sell them? A. I sold one to a man by the name of Pifferling.

Q. And the other? A. I think it was to a man by the name of Poulton, who was a fresco painter. That is my recollection. It has been a good while ago.

Q. That is the only transaction in that neighborhood that you are acquainted with personally? A. Well, no, sir. I am acquainted with a good many transactions; I am acquainted with other transactions, but you asked me if I had bought and owned any property, as I understand you. I can give you the price of other property that I knew about and that I had something to do with in that vicinity.

Q. The deeds for the property you have mentioned as having sold will show the consideration, will they not? A. I think so, sir.

Q. Did you ever buy or sell any property on G street? A. At that time, do you mean, sir?

Q. Well, prior to the 26th of March, 1884? A. Yes, sir; I sold some property on G street. It was considerably before this
148 boom.

Q. I am not talking about the boom; I am talking about the 26th of March, 1884. Did you buy or sell any property on G street before that time? A. I had something to do with some sales on G street between Ninth and Tenth, but I do not remember what the price obtained was and just when it was.

Q. Was it prior to the 26th of March, 1884? A. Yes, sir; it was shortly after I went into business; within two or three or four years afterwards.

Q. Did you ever buy or sell any property on Ninth street in the neighborhood of Ninth and G streets? A. No, sir; I do not recall any.

Q. Did you ever attend any sales of property prior now to the 26th of March, 1884, on either G or Ninth, in the neighborhood of this property? A. I do not recall any, sir.

Q. You were not present at the sale of this property, were you? A. No, sir.

Redirect examination.

By Mr. TOTTEN:

Q. Has there been any change in the general atmosphere of the real-estate market since 1881, up in that vicinity? A. Yes, sir; very materially.

Q. What distinction has it taken? A. The tendency has been upward, sir; right along.

Q. When did that tendency to go up, or the beginning of this boom that you speak of, commence? A. Well, the tendency
149 upward had been, I should say, ever since 1877 or 1878.

Q. When did that wonderful advance in the prices on F street begin? Do you remember the date, or about the date? A. I think about 1881 and 1882.

Q. Did that affect property on Ninth, Tenth, G, and H streets, in that vicinity? A. Yes, sir; there was an increase in the valuations

of property generally all over the city. In fact, they had asserted themselves in other sections before they reached F street.

Q. Had the effect of this real-estate excitement reached Ninth street—for instance, between G street and New York avenue, in 1881? A. I should say it had; yes, sir.

Q. How was it in 1884? A. In 1884 the market was, I considered, on the increase.

Q. Do you know of any sales along on Ninth street at any time about 1884, either before or after 1885 or 1886? A. I knew of the sale of the Saint Cloud building.

Q. Where was that situated? A. On the corner of Ninth and F streets.

Mr. DAVIDGE: When? A. That was sold, I think, about 1876 or 1877.

By Mr. TOTTEN:

Q. Do you know the prices that reigned there? A. It was first sold under a deed of trust, as nearly as I can recollect, for eighty some thousand dollars.

Q. That would be about how much a foot, do you know? A. There was about eight thousand feet in that lot. The lot is about 54 feet on F street and 116 on Ninth, and there is a little jog
150 in there that forms an "L." That ground was again sold to Barbour, Albright & Co., I think, about two years later, for $160,000.

Q. Has it been sold since that? A. It was sold to Mr. Albright after that, I think, taken in cash settlement.

Mr. DAVIDGE: At what time? A. Two years after that, sir; somewhere in that neighborhood. He took it, I think, at $169,000 or $170,000, in dissolution of partnership. The last sale was to the trust company for $200,000.

Q. Do you know of any sales on G street, say from 11th up towards 7th, along in 1881, '82, '83, '84, '85, '86, or '87? A. No, sir; I do not recall any sales in there. The southeast corner of F and Ninth, I think, was sold about 1884.

By Mr. DAVIDGE: The southeast corner of F and Ninth? A. Yes, sir; I think that was sold for about $10 a foot.

Q. In 1884? A. Yes, sir.

By Mr. TOTTEN:

Q. Where did Mr. McLane build his building for flats, as they are called? A. On Ninth street, do you mean?

Q. Yes, sir. A. He built the "Frederick," at Ninth and New York avenue.

Q. Was there not a large building built south of that on Ninth street some time recently? A. There was one built just about the same time Mr. McLane built, diagonally across.

151 Q. Diagonally across? A. Yes, sir.

Q. Do you know how much that property b-ought per foot and when it was sold last? A. The corner of Ninth and New York

avenue was sold last, I think, about six years ago, six or seven years ago; I won't be certain about that.

Mr. DAVIDGE: That would be 1886.

(By Mr. TOTTEN:)

Q. Do you know for how much? A. That sold for between $4.50 and $5.00.

Q. Along about 1886—— A. There were no improvements upon it; they had been burned down.

Q. In making your estimate upon this property that we are talking about, on the corner of Ninth and G streets, did you reckon anything for the building in putting your price upon it for 1884? A. Very little, sir.

Q. Would those buildings be of any value to a person buying that property for speculative purposes? A. No, sir; none whatever. It would be a detriment to any one wanting to improve it.

Q. What do you say about that property as to its availability for improvement? A. I do not think there is any finer corner than that in Washington for the purpose of a flat or for stores.

Q. Do you know the distance of that property from the Patent Office? A. Yes, sir; it is right across the street.

Q. Do you know the width of the street? A. It is about 60 feet wide, I think; between 60 and 70.

152 Mr. TOTTEN: It is about 80 feet, I think, is it not?

The WITNESS: I do not think it is. It is very narrow there.

Recross-examination.

By Mr. DAVIDGE:

Q. What makes you think the increase in the values on F street took place in 1881 or 1882? Have you any means of fixing that date? A. Well, from the simple fact that prices had increased all over Washington, going right straight along.

Q. Is that the basis of what you said? A. Well, I know of sales that were made on F street along in 1882, '83, and '84.

Q. I am not talking about 1882, '83, or '84. You spoke of a marked increase in the values of property on F street in 1881 or 1882? A. Yes, sir.

Q. I want you to give me instances of any sales of property on F street in 1881 or 1882 indicating a marked increase. A. I can name the old McLaughlin property on F street between 12th and 13th.

Q. Can you fix the time—where was the old McLaughlin property? A. That was about 12th street. It was where Thorne's plumbing shop is now, sir.

Q. On the north side of F between 12th and 13th? A. Yes, sir; on the north side of F.

Q. When was that sold; can you name the date? A. That property was sold about 1881 or 1882.

Q. For what price? A. It was sold then, I think, for
153 $15,000 or $16,000. I made the sale.

Q. How much a foot would that be? A. I do not remember the size of the lot. I made the sale, but it was not sold at that time by the foot, and I have no reason to remember that.

Q. When did that sale take place? A. About 1881 or 1882, I think.

Q. Now reflect, Mr. Burford, and tell me whether the remarkable increase in the value of property on F street was not about the time or shortly after Moses proceeded to improve the southwest corner of 11th and F streets. A. Oh, no, sir; it was considerably before that.

Q. You think it was before that? A. Yes, sir.

Q. I only want your opinion about it. A. Mr. Warner had located there. Mr. Waggaman had located on F street. There was the Sun building. All those buildings were there prior to Mr. Moses.

Q. I do not mean to say that there was not some increase, but the marked increase. Do you know when the Boston store was built? A. The Boston store was built about 1884, as near as I can remember.

Q. You have a very poor memory. Do you think that — Boston store was built as early as 1884—eight years ago? Try to reflect. A. I think it has been between six and eight years.

Q. Between six and eight years; that is your recollection? A. Yes, sir.

Q. Take the house next to it—the Talty house—on F
154 street; when was that built? A. That was built prior to the Boston house.

Q. When was that built? A. I really could not tell you the exact date.

Q. You cannot tell? A. No, sir.

Q. Now, you have been testifying about the St. Cloud building. That is the most valuable corner on F street, is it not—the southwest corner of F and Ninth? A. It is now, sir. It was not at that time.

Q. It was not at what time? A. I can remember the time when that property deteriorated rather than improved.

Q. You recollect the time when the southwest corner of Ninth and F streets was not the most valuable corner on F street—what time was that? A. I simply gave it as my opinion that it was not the most valuable corner on F street.

Q. I do not want your opinion unless it is founded on facts. I want to know when it was that that corner was not the most valuable corner on F street. A. I only state my opinion because the parties who owned that property, as I was informed, lost money on it. That would show that the property went back in price.

Q. I want to know at what time, if you can name a time, the St. Cloud building, at the southwest corner of Ninth and F streets, was not the most valuable property on F street. If you can name a time, do so.

Mr. TOTTEN: He did.

A. Well, I can name from the very time I came to Washington, from the time when I started in business—when the old Federal buildings were more valuable than Ninth street.

Q. Where is the old Federal building? A. Corner of 7th and F streets. When that property was occupied by such men as
155 B. H. Warner & Co. and by patent attorneys—I think Munn & Co. were there, if I am not mistaken. At any rate, the building was thoroughly well filled and was considered one of the best-paying properties on the street.

Q. You name the Federal building? A. Yes, sir.

Q. What other building? A. Well, I do not recall exactly any other property. I have named that as one building because the business at that time was downtown, and not uptown; most of it.

Q. There is no down or up as between the Federal building and the St. Cloud building, is there—between 7th and Ninth? A. There is this difference: At that time the Federal building was worth more than the 9th Street building, and now the 9th Street building is worth more than the Federal building.

Q. Excepting the Federal building, can you recollect the time when what you call the St. Cloud property was not the most valuable piece of property on F street? A. Well, that has always been a desirable corner, but if you are asking me for data and facts, and not for my opinion, I am not prepared to answer it. I am simply giving you my opinion, having reference to the knowledge of my business, and having in view the advance of prices and the locations of different properties, as to what one property is worth as compared with another.

Q. Do you know what Moses paid for the southwest corner of Eleventh and F streets? A. No, sir; I do not. I did know
156 it, but I have forgotten it.

Q. Do you know what the Boston people paid for their corner—the northeast corner? A. Do you mean for the whole property or the price per foot, or how?

Q. The price per foot. You do not know, do you? A. No, sir; I do not remember that. I know what the other corner sold for.

Q. What other corner? A. The Mertz building.

Q. That sold very recently, did it not? A. Within a couple of years.

Q. Within a couple of years? A. Yes, sir.

Q. Do you mean to say that there has not been a great change in the value of property between 1884 and two years ago—1890—on that street and in that neighborhood? A. Yes, sir; unquestionably. Property has increased there right straight along.

Q. Enormously, has it not? A. Well, it has increased. I do not think there has been anything so very enormous about it as compared to other localities or other cities. I think that F street has simply repeated what every business street will repeat. After it is started once and substantial business men have located on it they draw others, and there is a consequent increase in values.

Q. That is a very nice theory. A. That is not theory; that is a fact.

157 Q. What I want to get at is whether there has not been a most extraordinary increase of values on F street between 1884 and the present time. A. There has, sir. There has been an extraordinary increase all over Washington.

Q. Has not the increase on F street been greatly out of proportion to what it has been in other parts of the city? A. No, sir; it has not been as great in proportion to what it has been on G street, taking into consideration the business interests.

Q. When did the boom on G street begin, do you know? A. The decided boom on G street when property has gone up to $15 or $20 a foot is only within the last two or three years. I might really say from the establishment of the electric road there.

By Mr. TOTTEN:

Q. You say the proportion?

Mr. DAVIDGE: I object to the further opening of this examination.

By Mr. TOTTEN:

Q. You say the proportion of increase or the comparative increase in prices on G street has been greater than on F? A. Yes, sir.

Q. How was it as to Ninth street as compared to F? A. Well, Ninth street has increased in value, I should say, in proportion to the business interests that have been there, at least greater than F street.

Q. How was the increase in values on Ninth, G, and F streets between 1881 and 1884—was it great or little, rapid or slow?

158 Mr. DAVIDGE: Objected to as suggestive and leading.

A. Between 1881 and 1884. I can answer that question by the changes in the price of property that was placed in my hands. I had, for instance, a piece of property on Ninth street between E and F that in 1880 or 1881 I could have sold for ten or twelve thousand dollars, and in 1884 or thereabouts that property could not have been bought for less than eighteen or twenty thousand dollars.

Q. Where was your office in 1875 and 1876? A. It was in the old Seaton building, the Henry S. Davis building.

Q. Did you ever have an office on F street? A. Yes, sir.

Q. Where? A. I had an office in the Le Droit building, 804 F street, and I had an office at 1115 F street.

Q. How long were you on F street altogether? A. I was on F street altogether about 6 or 7 years.

By Mr. DAVIDGE:

Q. You have spoken of selling property on 9 street between——

Mr. TOTTEN: I object to Mr. Davidge going into this examination any further.

By Mr. DAVIDGE:

Q. You have spoken of selling property on 9th street between E and F streets and of the change in values between 1881 and 1884? A. Yes, sir.

Q. Did you sell it in 1884? A. No, sir.

159 Q. What do you mean by its value in 1884, the value at which it was held? A. Yes, sir.

Q. That is all you know about it? A. Yes, sir.

By Mr. TOTTEN:

Q. Has it been sold since? A. The property has been sold since for $25,000.

By Mr. DAVIDGE:

Q. At what time, within what year? A. Within the last 5 or 6 years.

Q. You do not know exactly? A. No, sir; I know when it was sold.

Q. Did you sell it? A. No, sir.

Q. Did you buy it? A. No, sir.

Q. Who bought it? A. That I do not know.

Q. Who sold it? A. That I do not know; I simply remember the transaction and transfer at the time.

Q. That is, you read it in the published account? A. I know the property was held at that time and sold at $25,000.

Q. How do you know that unless somebody told you so? A. I had it on my books for sale.

Q. Who put it on your books for sale? A. The owner.

Q. Who was the owner at that time? A. It belonged at that time to a Mrs. Rich, as near as I can remember.

160 Q. And she put it on your books for sale in 1881? A. That property was on my books from the time I went into business until the time it was finally sold.

Q. When was it put on your books—in 1876? A. Shortly after I went into business.

Q. When was that? A. I have stated that I went into business in 1875. I had that property and rented it and had it on my books for sale. I remember I made a loan on it. I had all of this party's business at that time.

Q. Mrs. Rich, you mean? A. Yes, sir.

Q. Her deed will show when it was sold and all about it? A. Yes, sir; I suppose so, unless it was a nominal consideration.

Q. Unless the consideration was nominal? A. Yes, sir.

Q. All you know about it is that when she put it on your books she told you she would take a certain price, and you heard afterwards that it has been sold at another price? Am I right? A. Well, that is about it. I cannot go back to everything. I have got a thousand and one properties on my books, and almost as many owners.

Q. What is the number of that Rich property? A. It is abou

three or four houses from E street, I think. About 506 would be about the number, I think.

W. E. BURFORD.

Subscribed and sworn to before me this 5 day of March, A. D. 1892.

WM. HERBERT SMITH, *Examiner.*

161 Mr. TOTTEN: I offer in evidence equity rules Nos. 71 and 72 of the rules of our equity court, adopted by the supreme court of the District of Columbia and printed in 1875.

I also put in evidence rules Nos. 70 and 71 of our present rules of court, which were adopted and printed in 1886.

Mr. DAVIDGE: These rules are severally objected to as irrelevant and inadmissible and as relating to matters *res adjudicata.*

The said rules are in the words and figures following, to wit:

"71."

"Whenever any reference of any matter is made to the auditor to examine and report thereon, the party at whose instance, or for whose benefit, the reference is made, shall cause the same to be presented to the auditor for a hearing on or before the next rule day succeeding the time when the reference was made, if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to *to* be had before the auditor, at the costs of the party procuring the reference."

"72."

"Upon every such reference the auditor shall, as soon as he reasonably can after the same is brought before him, assign a time and place for proceedings in the same, and give due notice thereof to each of the parties or their solicitors; and if either party fail to appear at the time and place appointed, the auditor may proceed *ex parte*, or, in his discretion, adjourn the examination and pro-

162 ceedings to a future day, giving notice to the absent party or his solicitor of such adjournment. The auditor shall proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party may apply to the court, or a justice thereof, for an order to the auditor to speed the proceedings, and to make his report, and to certify to the court or judge the reasons for any delay."

"70."

"Whenever any matter is referred to the auditor, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the auditor for a hearing on or before the next rule day succeeding the time when the reference was made. If he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the auditor, at the cost of the party procuring the reference."

"71."

"Upon every such reference the auditor shall, as soon as he reasonably can after the same is brought before him, assign a time and place for proceedings in the same, and give due notice thereof to each of the parties or their solicitors and if either party fail to appear at the time and place appointed the auditor may proceed *ex parte*, or, in his discretion, adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment. The auditor shall proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party may apply to the court, or a justice thereof, for an order to the auditor to speed the proceedings, and to make his report, and to certify to the court or justice the reasons for any delay."

163

A. W. FERGUSSON, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined—

By Mr. TOTTEN:

Q. What is your occupation? A. Attorney-at-law.

Q. When were you admitted to the bar of this court? A. I think in 1885.

Q. Were you ever employed in my office as clerk or assistant? A. Yes, sir; I was employed here.

Q. How long were you in my office? A. Six years and a half, sir.

Q. Which room did you occupy whilst you were here? A. The one next adjoining yours.

Q. Was that the entrance room? A. Yes, sir.

Q. Were you accustomed to receive or to see notices which came to me? A. Usually; yes, sir.

Q. Did you receive a notice at any time between the 31st of July, 1885, and the 4th of August, 1885, from the auditor that an audit would be had in the case of B. U. Keyser, receiver, *vs.* Jane C. Hitz, being equity cause in this court No. 6583?

164 Mr. DAVIDGE: Objected to as irrelevant and incompetent and as *res adjudicata.*

A. Not that I remember. Of course there were several cases that came in, but I do not recall any order of that kind. I was instructed by you in your absence to sign any notices that might be left here and to sign your name to them.

Q. That is to admit service? A. Yes, sir.

Q. Do you remember of having done that on such a notice as I have referred to about that time? A. No, sir.

Q. If you had received it do you think you would remember it?

Mr. DAVIDGE: I object to that as irrelevant and inadmissible.

A. I think so. If I had signed it I would certainly be able to recognize my own handwriting.

A. W. FERGUSSON.

Subscribed and sworn to before me this 5th day of March, A. D. 1892.

WM. HERBERT SMITH,
Examiner in Chancery.

165 WILLIAM A. McKENNEY, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined—

By Mr. TOTTEN:

Q. You have been a member of this bar for how long a time? A. For 12 years or more.

Q. You are practicing law now? A. Yes, sir.

Q. How long have you been in my office? A. Since May, 1881.

Q. There was an audit made in the case of Keyser, receiver, *vs.* Hitz, equity cause No. 6583, or there appears to have been one made, on or about the 4th day of August, 1885. Do you remember of having received a notice of such an audit about that date?

Mr. DAVIDGE: Objected to as irrelevant and incompetent and as *res adjudicata.*

A. I have no recollection of it.

Q. If you had received it do you think you would have remembered it? A. Well, my memory is a pretty fair one. I think I should.

Q. You were pretty generally in the office and acknowledged service for me?

Mr. DAVIDGE: Objected to as irrelevant, incompetent, and leading, and as *res adjudicata.*

A. I frequently did so.

WM. A. McKENNEY.

Subscribed and sworn to before me this 5th day of March, A. D. 1892.

WM. HERBERT SMITH,
Examiner in Chancery.

166 The further taking of these depositions was thereupon adjourned to Saturday, March 12th, 1892, at 3 o'clock p. m.

WASHINGTON, D. C.,
March 21, 1892—3.30 o'clock p. m.

Met, pursuant to adjournment, at the office of Enoch Totten, Esq., Washington, D. C.

Present on behalf of the complainant, Mr. Totten; present on behalf of the defendant-, Mr. Mussey and Mr. Davidge.

Whereupon JAMES G. PAYNE, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined—

By Mr. TOTTEN:

Q. Your name is James G. Payne? A. It is.

Q. Are you the present auditor of the supreme court of the District of Columbia? A. I am.

Q. How long have you been auditor? A. Ten or twelve years. I do not know exactly.

Q. You were auditor in March, 1885, were you not? A. I was.

Q. Do you remember of having made a report in the case of Keyser, receiver, *vs.* Hitz *et al.*, equity cause No. 6583, in the supreme court of the District of Columbia? A. I do.

Q. You made two reports in that case. The first one was filed on the 31st of March, 1885?

Mr. DAVIDGE: I object to that. The record will show.

Mr. TOTTEN: I invite your attention to this language in that report:

167 "From the statement of Richard W. Tyler made in this reference, it appears that upon the passage of the decree in general term he took possession of this property as receiver, and held it in that capacity until the 26th of March, 1884, at which time it was sold under the provisions of the deed of trust of June 18, 1877.

The nett proceeds of this sale fall short $4,745.73 of the amount of the indebtedness to William P. Jenks secured by the trust."

By Mr. TOTTEN:

Q. I would like to know how that came to be inserted in your report, if you know.

Mr. DAVIDGE: I object to oral qualifying a report long since filed of record and passed upon by the supreme court of the District and of the Supreme Court of the United States.

A. I am not able to state from recollection upon what that portion of the report is based. I do remember that Mr. Tyler, who was then holding the position of receiver and who had been holding that position under an order of the court, appeared before me; that Mr. Keyser appeared and testified, and that there were some general statements about the case which were not reduced to the form of testimony. What they were I do not know. I could now give nothing more than a presumption as to how I procured or from what source the information came which is stated in this sentence: "The nett proceeds of this sale fall short $4,745.73," &c. As to the other part of your quotation, I am satisfied it came from the statement of Mr. Tyler made in my office.

Q. Mr. Tyler was not sworn and did not testify in that audit, did

he? A. I think not. I could not state that from recollec-
168 tion, but I do not see any deposition of his in the record.

Q. Do you remember whether that was a subject of discussion before you or not? A. It was.

Mr. DAVIDGE: The foregoing objection is renewed to all the questions.

By Mr. TOTTEN:

Q. I now show you, Mr. Payne, a copy of the report of Richard W. Tyler, as receiver, which appears to have been made to you July 31, 1885. Tyler was receiver in this case at that time, and made that report to you. I also show you your report, in which you state his account as such receiver, which report *was* made by you was filed with the report of the receiver August 4, 1885, in the cause, and ask you how long a time elapsed between the delivery of Tyler's report to you in 1885 and your report stating the account which I have shown you?

Mr. DAVIDGE: Objected to because the records will show. The very papers referred to show it.

A. I can only state from an examination of the papers. The receiver's report appears to have been delivered to me on the last of July and my report filed on the 4th of August.

Q. Do you remember whether or not you sent any notice of the taking of that audit to me or to Mrs. Hitz? A. I can only state that from the general practice in my office.

Q. What was the general practice of your office? A.
169 Where parties come in order to have an account stated and there appears to be no dispute, I am not in the habit of sending notices to any. Where that is not the case and there is a controverted account or issue, I do send notices.

Q. This was regarded as not a controverted account, I suppose?

Mr. DAVIDGE: Objected to. It was a controverted account.

A. I have only a general recollection of this case, there being two references and one or two principal questions involved. In the first reference I think there was one principal point involved, and that was as to the appropriation of a fund for the payment of taxes and assessments upon the property. All the discussion in the case and all the controversy that I have any recollection of was over that one issue.

Q. Have you made any examination of your memoranda or the records in your office for evidence that you did send me such a notice, either to me or to my office? A. I have never kept a record showing the sending of notices. I have always been provided with blanks for that purpose and for sending them out. Sometimes where there was a number of parties other than attorneys or solicitors, I have kept an original copy or perhaps had service made personally and acknowledged and filed that with the papers. I do

not find any such document in my papers in this case, and, as I say, it was only occasionally that I kept such a record.

No cross-examination.

JAMES G. PAYNE.

Subscribed and sworn to before me this 21st day of March, A. D. 1892.

WM. HERBERT SMITH, *Examiner.*

170 EXHIBITS TO COMPLAINANT'S DEPOSITIONS.

Filed August 3, 1898.

EXHIBIT No. 1.

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver, &c., Complainant, *vs.* JOHN HITZ and JANE C. HITZ, His Wife; Eminel P. Halstead, Robert B. Donaldson, Charles E. Prentiss, William R. Chipley, Sarah L. Crane, W. P. Jenks, and Richard W. Tyler, Defendants.	Equity. No. 6583.

Filed January 10, 1879.

To the supreme court of the District of Columbia, sitting in equity:

The complainant, Benjamin U. Keyser (receiver), a citizen of the United States, resident in the District aforesaid, brings this his bill of complaint against the above-named parties defendant, and thereupon he avers and charges:

1. That he is the duly appointed and qualified receiver of the "German-American national bank," a corporation organized under the laws of the United States, and he brings this suit as receiver aforesaid.

2. The defendants John and Jane C. Hitz, Eminel P. Halstead, Robert B. Donaldson, Charles E. Prentiss, William R. Chipley, Sarah L. Crane, and Richard W. Tyler are residents of the District aforesaid, and the defendant Jenks is believed to be a resident of Philadelphia, in the State of Pennsylvania, and are all sued in their own right excepting the defendant Tyler, who is sued as trustee, and the defendants Donaldson and Prentiss, who are likewise sued as trustees as well as in their own right.

171 3. Heretofore, to wit, on the 26th day of January, A. D. 1876, the defendants John Hitz and Jane C. Hitz, by their deed of indenture, bearing said date, conveyed unto the defendants Donaldson and Prentiss the following-described real estate, situated in the city of Washington, in the District of Columbia, to wit: All of those certain pieces or parcels of land and premises known

and distinguished as and being all of lot numbered three (3) and the west thirty (30) feet by a depth of eighty-seven (87) feet of lot numbered two (2), in square numbered four hundred and five (405), "together with all the easements, hereditaments, and appurtenances to the same belonging or in anywise appertaining, and all the estate, right, title, interest, and claim whatsoever, whether at law or in equity," of the said John Hitz and the said Jane C. Hitz, to the use of the said Donaldson and Prentiss, "and the survivor of them, his heirs and assigns," in trust, however, to secure the punctual payment of two several promissory notes for the sum of ten thousand dollars ($10,000) each, dated January 5, 1876, nominally drawn by the defendant William R. Chipley, to the order of the defendant E. P. Halstead, trustee, and payable, with interest, at the rate of ten (10) per centum per annum, in one and two years after said last-mention- date respectively; interest payable semi-annually and at the same rate until paid.

The said deed further expressly provides that the defendant John Hitz should use and occupy the said described premises and take the rents and profits thereof until default in the payment of said notes or either of them, or any instalment of interest due thereon, &c., and upon full payment of said notes or extensions or renewals thereof and the interest thereon, &c., to release and reconvey
172 the said described premises unto the said John Hitz, his heirs or assigns, &c.

And in default of the payment of said notes or either of them, or any instalment of interest thereon, provision is made for a sale of said ground and premises under the terms of said trust deed, all of which will fully and at large appear by reference to the record thereof in Liber 805, folio 421 *et seq.*, of the land records of the District of Columbia, and to a duly certified copy thereof herewith filed, made part of this bill, and marked Exhibit A, and complainant prays leave to read the same at the hearing of this cause, and he avers and charges that said trust deed created a lien or incumbrance upon the aforesaid real property, and that the same could only be lawfully released from the operation of said lien or incumbrance and said property reconveyed to "the said John Hitz, his heirs or assigns," upon the satisfaction of said notes, interest, &c.

4. Complainant further shows unto the court that the aforesaid promissory notes were duly endorsed before maturity by the defendant Eminel P. Halstead, "trustee," and delivered to "the German-American savings bank," a banking institution in the city and District aforesaid, which, on the 14th day of May, A. D. 1877, was duly organized under the laws of the United States as a body corporate by the name and style of "the German-American National Bank of Washington," and thereby acquired all the assets, property, &c., of said German-American savings bank, including the promissory notes hereinbefore mentioned and described, which were drawn, endorsed, and discounted by said bank solely for the accom-
173 modation and use of defendants Hitz or one of them, they, or one of them, receiving the amount thereof in cash from said bank, which held the same for value, as aforesaid, until the 1st

day of November, A. D. 1878, when the complainant was appointed receiver, whereupon they passed into his custody and are now held by him by virtue of his said office, overdue and unpaid. Complainant files herewith true copies of said notes, and the same are made part hereof, marked Exhibits "B" and "C," respectively, and show all proper credits of interest paid thereon.

5. Complainant further avers and charges that the defendants John and Jane C. Hitz, Donaldson, Prentiss, and Halstead, intending and contriving to cheat and defraud the said "German-American National Bank" of Washington, whereof the complainant is receiver, as aforesaid, out of the amount of said promissory notes held by said bank for value as aforesaid, did, on or about the 16th day of June, A. D. 1877, by combining and confederating together and in collusion one with the other, falsely and fraudulently procured and the defendants Donaldson and Prentiss falsely and fraudulently executed a certain deed of indenture purporting to release the aforesaid trust deed mentioned in paragraph three of this bill, and to convey the real property therein mentioned to the defendant Jane C. Hitz, her heirs and assigns, well knowing that the indebtedness mentioned and described in said trust deed had not been paid or satisfied in any respect whatever, and that the aforesaid promissory notes were held by said bank as part of its assets and the said release was not authorized by the holder of said notes.

Complainant further avers that at the date of the execution of said release deed only one of said notes had matured, and he
174 claims and insists that the execution and delivery for record of said deed of release having been in fraud of the rights of the holder of said notes, to wit, the said bank, and all the creditors thereof, and being without due authority and contrary to the very terms of the trust which it purports to release, is null and void and cannot lawfully operate to discharge the security created by said trust. Complainant hereby refers to the record of said deed of release in Liber 857, folio 408 *et seq.*, of the land records aforesaid, and to a duly certified copy of the same, herewith filed, marked Exhibit "D," and prays leave to read the said copy at the hearing of this cause in support of the averments herein made.

6. Complainant further avers and charges that contemporaneously with the execution, delivery, and record of said fraudulent deed of release the defendants Jane C. Hitz and John Hitz, further intending and contriving to cheat and defraud the aforesaid bank in respect of said promissory notes and the amount thereof, did, on the said 16th day of June, A. D. 1877, convey the hereinbefore-described ground and premises in fee-simple unto the defendant Sarah L. Crane by deed of indenture bearing said date and recorded in Liber 857, folio 409 *et seq.*, of the land records aforesaid; that, notwithstanding the consideration expressed in said deed, complainant on information and belief avers and charges that said deed was executed without any consideration whatever, and that neither the said Crane nor any one for her ever gave any consideration for said conveyance, but the same was made and placed on record by the defendants Hitz or one of them for the purpose of enabling said

defendants to negotiate a new loan upon said ground and premises in the name of another and for the use and benefit of said defendants, Hitz, exclusively.

175 Complainant files herewith a duly certified copy of said deed last aforesaid, and the same is made part hereof, marked Exhibit "E," and complainant prays that it may be read at the hearing of this cause.

7. Complainant further shows unto the court that on or about the 18th day of June, A. D. 1877, the defendant Crane, combining and confederating with the defendants Hitz and other persons to the complainant unknown, did, according to the land records aforesaid, execute a certain deed of trust to the defendant Tyler, whereby she conveyed, or pretended to convey, the hereinbefore-described ground and premises to said defendant last named in trust to secure (according to the recitals of said trust deed) "the full and punctual payment of one promissory note, of even date with these premises, for the sum of twenty thousand dollars ($20,000), signed by the said Sarah L. Crane and made payable to the order of John Hitz, and by him endorsed to the order of W. P. Jenks, of Philadelphia, Pennsylvania, with waiver of notice and protest, the said note being payable in three years from date, with interest, at 8 per cent. per annum, until paid, interest payable quarterly (being for money loaned by the said W. P. Jenks to the said Sarah L. Crane), for the sole use and benefit of the defendants Hitz." Said deed is recorded in Liber 857, folio 411 *et seq.*, of the land records aforesaid, and a duly certified copy thereof is herewith filed, marked Exhibit "F."

8. Complainant further shows to the court that shortly after his appointment as receiver of said bank, to wit, on the 12th day of November, A. D. 1878, the defendant Crane, by deed of indenture bearing date the 11th day of the same month and year,

176 conveyed the hereinbefore-described ground and premises unto complainant, as the receiver of said bank, in trust to secure the payment of the promissory notes secured by the trust deed of January 27, 1876, and mentioned in the third paragraph of this bill, reciting that said notes are still due and unpaid and are in the possession of and held by the said B. U. Keyser (the complainant), as receiver as aforesaid, as assets of said bank, and further granting the rents, issues, and profits of said above-described ground and premises pending the existence of said trust, and complainant hereby refers to said deed, duly recorded in Liber 902, folio 153 *et seq.*, of the land records aforesaid, the original whereof is herewith filed, marked Exhibit "G," made part hereof, and prayed to be read at this hearing of this cause.

9. Complainant further avers and charges that the transaction between the defendant Jenks and the defendant Crane, as recited in the trust deed to the defendant Tyler, hereinbefore mentioned, was conducted by said last-named defendant, who is an insurance agent and whose place of business is adjacent to that of the defendant Halstead and to said bank; that said defendant, Tyler, acted as the agent of the defendant Jenks and is chargeable with the notice of the want of the due execution of the power reposed in the de-

fendants Donaldson and Prentiss under and by virtue of the trust deed of January 26th, 1876, and referred to in paragraph three (3) of this bill.

10. Complainant further shows unto the court that the ground and premises hereinbefore described are not of sufficient value to realize upon the sale thereof an amount sufficient to pay the notes held by the complainant and the interest thereon and the
177 note mentioned and described in the trust deed from the defendant Crane to the defendant Tyler, and that in equity the indebtedness secured, as aforesaid, and evidenced by the trust and the notes so held, as aforesaid, by complainant ought first to be paid.

But so it is, may — please the court, the defendant Tyler, insisting upon the nominal priority of the trust deed to him in favor of the defendant Jenks, has advertised said ground and premises for sale at public auction on the 20th day of January inst., at 4 o'clock p. m., by reason of default in the payment of an instalment of interest on the note purporting to be thereby secured, and if said sale shall under the circumstances aforesaid be allowed to proceed to consummation, the notes held by the complainant, as aforesaid, will be rendered valueless, as the parties thereto are wholly irresponsible and unable to pay them. Complainant files herewith, marked Exhibit H, a copy of the advertisement for the sale of said ground and premises, and the same is made part hereof.

11. Complainant is advised and believes, and accordingly avers, that, notwithstanding the aforesaid release of the trust to the defendants Donaldson and Prentiss, he is entitled to priority in the payment of said notes over the note secured by the trust deed to the defendant Tyler; but if upon the facts as they may hereafter be established he should not be so entitled, he is, nevertheless, as receiver aforesaid, entitled to a decree for the amount of said notes against all the parties hereto concerned, as aforesaid, in fraudulently procuring or executing said release of June 16, 1877, including the defendants John and Jane C. Hitz, and he is advised that in equity he is also entitled to a decree against all the right, title, and interest and estate of either of said defendants in and to any of the
178 real property owned by them or either of them, inasmuch as the aforesaid notes were executed, delivered, and discounted for their use and benefit, and they or one of them received the money thereon. Wherefore said trust deed of January 26, 1876, to the defendants Donaldson and Prentiss, should be deemed and held to be a lien upon all and singular the real property of defendants Hitz or either of them to the extent of fully satisfying and discharging said promissory notes of January 5, 1876, held by complainant, as aforesaid.

12. Complainant is informed and believes, and so believing avers, that the defendants John and Jane C. Hitz are insolvent, save and except a certain piece or parcel of real property in the city and District aforesaid known and described as lot numbered four (4) in square three hundred and seventy-nine (379), fronting on Penn.

sylvania — between 9th and 10th streets N. W. and known as "Metzerott hall."

Complainant is not advised whether the same is encumbered or not, but he insists that all the right, title, interest, and estate of said defendants, Hitz, in and to the same should be subjected to the satisfaction of the aforesaid promissory notes held by complainant; and, inasmuch as he is without remedy, save in a court of equity, where matters of this nature are properly cognizable, he prays:

Prayer.

1. That the above-named parties may be made defendants hereto and duly served with process.

2. That said defendants and each of them be required by this honorable court full, true, and particular answer to make
179 under oath touching the several matters and things herein contained and alleged, and especially that the defendants John Hitz, Jane C. Hitz, Robert M. Donaldson, Charles E. Prentiss, Emanuel P. Halstead, William R. Chipley, and Sarah L. Crane may be required to state and discover under oath all and singular matters and things connected with the execution and delivery of the deeds and notes wherein their names or the names of any or either of them appear as hereinbefore stated, the same as if the said several allegations were here repeated and articulately propounded unto them and each of them.

3. That the defendants W. P. Jenks and Richard W. Tyler may be required to state and discover under oath all the facts and circumstances connected with and surrounding the execution of the trust deed from the defendant Crane to the defendant Tyler, and the promissory note therein mentioned and described; when said transaction was first negotiated; by whom and with whom; what consideration, if any, was paid by the defendant Jenks for said note; how and in what manner, and to whom, and generally to answer as fully as if the said allegations concerning said defendants were here repeated and articulately propounded unto them and each of them.

4. That the deed of trust of January 26, 1876, to the defendants Donaldson and Prentiss may be decreed to have priority over the trust from the defendant Crane to the defendant Tyler, and that the notes held by complainant may be paid accordingly out of the proceeds of the sale of said ground and premises, when the same shall be decreed by this honorable court.

5. That in the event of a decree establishing the priority
180 of the trust deed from the defendant Crane to the defendant Tyler over the deed mentioned in the preceding prayer the complainant may have a decree for the amount of the notes, interest, and costs so held by him, as aforesaid, against defendants Chipley, Halstead, Donaldson, Prentiss, John Hitz, Jane C. Hitz, and Crane, and that said deed of trust of January 26, 1876, may be decreed to be and to constitute a specific lien upon all and singular the real property of the defendants Hitz or either of them as here-

inbefore mentioned and described and made known or as may hereafter be described and made known, until the full payment of the said promissory notes held by complainant, together with interest and costs thereon, and that said real property may be sold by decree of this honorable court for the purpose of satisfying said notes, interest, and cost.

6. That the real property mentioned and described in the third paragraph of this bill and in succeeding paragraphs referred to and conveyed to the defendant Tyler in trust and subsequently to complainant may be decreed by this honorable court to be sold for the purpose of discharging the encumbrances thereon, and that a trustee may be appointed to make said sale, and that pending this cause and until the final result thereof the defendants Jenks and Tyler and either of them may be restrained and enjoined from advertising or selling said property or in any manner interfering therewith; and—

7. That the complainant may have such other and further relief in the premises as may be agreeable to equity and good conscience.

B. U. KEYSER, *Receiver.*

181 I do solemnly swear that I have heard read the foregoing and annexed bill by me subscribed and know the contents thereof; that the facts therein stated as on my personal knowledge are true, and those stated on information and belief I believe to be true.

B. U. KEYSER, *Receiver.*

Subscribed and sworn to before me this 10th day of January, A. D. 1879.

R. J. MEIGS, *Clerk,*
By R. J. MEIGS, JR., *Assistant.*

The defendants to this bill are John Hitz and Jane C. Hitz, his wife; Eminel P. Halstead, Robert B. Donaldson, Charles E. Prentiss, William R. Chipley, Sarah L. Crane, N. P. Jenks, and Richard W. Tyler.

R. K. ELLIOT,
Solicitor and of Counsel for Complainant.

182 COMPLAINANT'S EX. NO. 2.

EXHIBIT "H."

Trustee's Sale of Valuable Business and Residence Property on the Northeast Corner of Ninth and G Sts. Northwest, Fronting 100 Feet on G Street, Opposite Patent Office. George Truesdell, Auctioneer.

By virtue of a deed of trust dated June 18th, A. D. 1877, duly recorded in Liber No. 857, folio 411 *et seq.*, one of the land records for the District of Columbia, and by direction of the party thereby secured, I will sell at public auction, in front of the premises, on Monday, the 20th day of January, 1879, at 4 o'clock p. m., all of

those certain pieces or parcels of land and premises situate and being in the city of Washington, District of Columbia, and known and distinguished as lot numbered three (3) and the west 30 feet front and running back with that width eighty-seven (87) feet in depth of lot numbered two (2), all in square numbered four hundred and five (405), as the same are known and described upon the plat or plan of said city, together with all the improvements and appurtenances, &c., to the same belonging.

Terms of sale: One-fourth cash (of which $500 will be required when the property is struck off) and the residue of the purchase-money in three equal annual payments, for which the notes of the purchaser will be taken, bearing interest from the date of sale until paid at the rate of eight (8) per cent. per annum, payable quarterly, and secured by a deed of trust on the property sold, and a satisfactory fire insurance on the improvements to be taken at the expense of the purchaser and properly assigned as additional security.

If the terms of sale are not complied with within seven
183 (7) days from day of sale, the property will be resold, at the risk and cost of the defaulting purchaser, after 5 days' advertisement.

All conveyancing and recording at the expense of the purchaser.

R. W. TYLER, *Trustee.*

Jan. 2, 3, 4, 8, 9, 10, 16, 17, 18.

COMPLAINANT'S EX. No. 3.

Restraining Order.

The defendant is hereby restrained, as prayed in the within-mentioned bill, until further order to be made, if at all, after a hearing, which is fixed for the 18th day of Jan'y, 1879.

By the court:

McARTHUR, *Justice.*

Attest: R. J. MEIGS, *Clerk, &c.*,
By M. A. CLANCY,
Ass't Clerk, &c.

184 (COMPLAINANT'S EXHIBIT No. 4.)

In the Supreme Court of the District of Columbia.

B. U. KEYSER, &c., &c., *vs.* JOHN HITZ ET AL. } Equity.

Filed February 21, 1879.

This cause coming on to be heard on complainant's motion for an injunction to restrain the sale by the defendant Tyler of the real property in the proceedings mentioned, and having been argued by counsel and duly considered, it is by the court this 21st day of Feb-

ruary, A. D. 1879, ordered that said defendant be, and hereby is, restrained as prayed until final hearing of this cause:

Provided, however, that the complainant, as receiver aforesaid, execute and file in this cause an undertaking in conformity with the 41st equity rule.

By the court:

MACARTHUR, *Justice.*

Endorsement: No. 6583, eq. doc. 19. Keyser *v.* Hitz. Order granting injunction upon filing of undertaking. Filed Feb. 21, 1879.

185 COMPLAINANT'S EXHIBIT No. 5.

Answer of Jane C. Hitz to Bill of Complaint.

Filed July 2nd, 1879.

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver, &c., vs. JOHN HITZ, JANE C. HITZ, and Others. } Equity. No. 6583.

The separate answer of Jane C. Hitz, one of the defendants in the above-entitled cause, respectfully shows as follows:

1. She admits the averments in the first paragraph of the bill.

2. She believes the averments in the second paragraph of the bill to be true.

3. In answer to the averments contained in the third paragraph of the said bill, she says that she has no recollection of ever having signed or acknowledged the deed therein mentioned and described, but says that she may have done so, but she does not know that the same was ever delivered and recorded; but she does say that the said deed was fraudulent as to her. She avers that the said property mentioned in the said paragraph was her sole and separate estate, inherited by her from her father, and that if she did sign and acknowledge said deed she so signed and acknowledged it in ignorance of its contents and through fraud and fraudulent concealments and devices on the part of the officers or some of them of the said German-American savings bank in charge of the business of that corporation. She avers that if she did sign said deed she did not know the contents thereof or its purpose
186 at the time thereof, and that if the contents of the said deed are as represented and she had been made aware of the same or the said contents had been explained to her she never would have executed such a deed. She further says that she never knew the contents of the said deed of trust or the nature thereof until after the failure of the said German-American national bank, and she also avers that she has been diligent in her efforts to find the original of said deed, but has been unsuccessful in such efforts, and she therefore insists upon as strict proof of the signing, acknowledging, and delivery of said deed as if she had distinctly and positively

denied the same in this her answer. She is informed and believes, and so believing charges, that the said William R. Chipley and the said E. P. Halstead are now and were at the date of the said deed of no pecuniary responsibility whatsoever, and, so far as said transaction is concerned, were "men of straw," and were used for the purpose of the said officers of the said German-American savings bank to fraudulently induce this defendant to part with her separate estate without any consideration and unwittingly. She further believes and charges that all the money ever represented by the said two notes made by said Chipley and payable to the order of the said E. P. Halstead, as "trustee," was money derived through and by means of a fraud upon her and out of and from her sole and separate estate, and that said notes and all moneys or property represented by them ought to be declared and held to be trust funds for her sole and separate use and benefit, and that all persons dealing with said notes or said property ought to be charged with full notice of the fraudulent character of the said transactions and with
187 notice of her rights in the premises.

Further answering said third paragraph, she says that she never received nor did anybody receive for her one cent of money or any other consideration whatsoever for said conveyance or for the property it purports to convey; that she was not indebted to any of the parties to said transaction, and was not at the time of the said deed a borrower of money and was not in need of money; she was not connected in business in any way with either the said Halstead or the said Chipley.

4. In answer to the averment contained in the fourth paragraph of the said bill, this respondent says that she denies that the said notes were made or used for her benefit, either directly or indirectly; and she further says that she does not know whether or not said notes have been paid; that she has no personal knowledge on that subject, and leaves that question to be disposed of hereafter upon the proofs to be adduced in the cause.

5. In answer to the fifth paragraph of the said bill, she says that so far as the averments contained in the said bill charge her with a conspiracy with John Hitz, Donaldson, Prentiss, and Halstead to cheat and defraud the German-American savings bank they are utterly untrue; that she was wholly without information of the said transaction until after the failure of the German-American national bank. She further says that the charge that she was in collusion with the said parties procuring the said release is wholly untrue. She says that the said release, if made as stated, was made to her as the vendee therein entirely without her knowledge, approbation, or consent, and that it was never delivered to her or to anybody authorized by her to receive it, and it was never
188 recorded with her approbation. She says, on the contrary, that she was in utter ignorance of the said transaction until after the failure of the said German-American national bank.

6. Answering the averments contained in the sixth paragraph of the said bill, this defendant says that she has no recollection whatsoever of ever having signed the said deed of June 16, 1877, to the

said Sarah L. Crane, but that if there is any such deed bearing her signature the said deed was procured from her by fraud and by frauduient concealments and devices on the part of the officers (or some of them) of the German-American national bank in charge of the business of that corporation; that she never had any knowledge that there was such a deed on record until she was advised thereof after the failure of the said national bank, and that the contents of the said deed were never made known to her by any person, and that if the contents are as stated, and they had been made known to her, she never would have executed such a deed, and that she has made diligent inquiry for the original of the said deed, but has been unable to ascertain where it is or whether or not it has been destroyed, and she therefore insists upon as strict proof of the signing, acknowledging, and delivery thereof as if she had positively denied the execution and delivery thereof; that the said property is situated on the corner of Ninth and G streets, near the United States Patent Office, in the city of Washington, and is worth, as she is informed and believes, about the sum of thirty-five or forty thousand dollars, and that she never received one dollar or one cent or any other consideration whatsoever for such a conveyance to the said Sarah L. Crane, and the consideration of forty thousand dollars mentioned in the
189 said deed as being the consideration for the execution thereof and the transfer of the said property is wholly fictitious, so far as this respondent is concerned. She is informed and believes and charges that the said Sarah L. Crane is a *feme sole*, and is entirely without property, and was, at the date of said deed, utterly unable to pay any such sum as forty thousand dollars ($40,000), which fact was at the time of the transactions mentioned in said bill well known, and, she is advised by counsel, was sufficient to put all persons dealing with the property of this respondent upon inquiry, and she charges that the said Sarah L. Crane was used as an instrument to further the purposes of the said officers of the said German-American national bank to cheat and defraud her of her said property, and in this connection she admits the averments of the said paragraph that the said conveyance to the said Crane was entirely without consideration, so far as this respondent is concerned.

7. In response to the allegations contained in the seventh paragraph of the bill, this respondent says that the charge that she confederated with the said Crane and other persons is wholly untrue; and in reference to the averments therein relating to the deed of trust made by the said Crane to the said defendant, Tyler, she says that she has no personal knowledge thereof whatsoever, and no information other than that derived from the said bill and from other sources since the failure of said bank, but that she has no reason to doubt the truth of such averments.

Further answering the averments in the said paragraph in reference to the charge therein contained that the said
190 promissory note therein mentioned was for the sole use and benefit of the defendants Hitz, she says that the said note

was not made for her benefit, and that she never received any benefit whatsoever, directly or indirectly, therefrom, and that she never knew of the making and delivery of the said note or the said deed of trust until after the failure of the German-American national bank, as aforesaid.

8. In reference to the averments contained in the eighth paragraph of the said bill, she says that she has no reason to doubt the truth of the statement therein made that the said Sarah L. Crane made, executed, and delivered the deed therein mentioned, but she avers that the said deed is in fraud of her rights. She further says, upon the advice of counsel and her belief, that the said Jenks and all other persons dealing with her said separate property and the said notes payable to said Halstead, as "trustee," had sufficient notice to put them upon inquiry touching the character of the transactions mentioned in said bill by means of the record of the said trust deed described in the third paragraph of the said bill, and the said two notes mentioned in said deed, as well as by means of the other well-known circumstances connected with the said fraudulent conveyances hereinbefore mentioned and set forth, and she submits to the court that the said Tyler and all persons claiming under said trust deed to him ought to be charged with full notice of the frauds practised upon her, and that said trust deed made by said Crane to said Tyler ought to be declared void as to her and her said separate property.

9. In reference to the averments contained in the ninth paragraph of the said bill, she says that she has no personal knowledge thereof.

191 10. Answering the averments contained in the tenth paragraph of the said bill, she says that she is advised and believes that the said property is worth, as hereinbefore stated, about the sum of thirty-five or forty thousand dollars.

11. Touching the conclusions of law set forth in the eleventh paragraph of the said bill, she submits to the court that the said receiver is, as against her, entitled to no lien upon the said property, and she denies, upon the advice of counsel and her own belief, that the said receiver is entitled to any such relief or decree as he therein prays for, and particularly she denies that the said receiver is entitled to any decree or any judgment against this respondent on account of the transactions mentioned in the said bill of complaint, and she again repeats that she never received any money in consequence of any of the said transactions or any consideration whatsoever for the said property, nor did anybody for her, and as to her personal liability or the liability of her personal and separate estate she denies that the said receiver of the said German-American national bank has any just claim or equitable right in or to the same.

12. In answer to the twelfth paragraph of the said bill, she denies that she is insolvent, and she says that she is the sole owner of the said property, known as the "Metzerott hall," mentioned and described in said paragraph, and that the same belongs to her as her sole and separate estate, and was by her inherited from her father

and that the said defendant, John Hitz, has no interest, as she is advised by counsel and believes, in or to the said property or
192 to the rent, issues, and profits thereof. She says that the said property is entirely unincumbered, so far as she knows. And having fully answered the bill of complaint in this cause so far as in the opinion of counsel it is necessary that she should answer the same, she prays to be hence dismissed with reasonable costs and charges.

JANE C. HITZ.

Duly sworn to.

ENOCH TOTTEN,
Solicitor for Defendant Jane Hitz.

COMPLAINANT'S EX. No. 6.

In the Supreme Court of the District of Columbia, the 24th Day of January, A. D. 1879.

BENJAMIN U. KEYSER
vs.
JOHN HITZ ET AL. } No. 6583, Eq. Doc.

The Separate Answer of the Defendant Richard W. Tyler to the Bill of Complaint of the Above-named Plaintiff.

This defendant, not waiving any right of exception to the manifest errors and imperfections of plaintiff's bill, but expressly insisting thereon and claiming the same benefit therefrom which he would have had on plea or demurrer, for answer unto so much of the said bill as he is advised it is necessary for him to make answer unto, answering separately, saith:

193 1. I believe the averment contained in paragraph numbered one of the said bill to be true.

2. The averments contained in paragraph numbered two of the said bill are also true, to the best of my knowledge.

3. I have no personal knowledge of the matters averred in paragraph numbered three of the bill and can neither admit nor deny the same, but I require proof thereof so far as they may be material to my case. For the contracts of said deed of trust, I refer to the records thereof.

I have no personal knowledge in regard to the matters averred in paragraph numbered four of the said bill, and require strict proof thereof. I deny that the notes referred to in said paragraph are now held by the plaintiff overdue and unpaid. I aver upon information and belief that the said notes were, on or about the 20th day of June, 1877, in the possession of and were the property of the said German-American national bank, of which the defendant Prentiss was at that time cashier. I aver of my own knowledge that on or about that date I paid to the said Prentiss the sum of $20,000 in full payment and satisfaction of the said notes, and that at the same time there was delivered and recorded a duly executed deed of

release, signed by the defendants Donaldson, Prentiss, and Halstead, wherein it was recited that the said notes were fully paid and satisfied.

5. I have no knowledge of any fraud or collusion, as charged in paragraph numbered five. I do know that I paid into said bank, on or about the 20th day of June, 1877, the sum of $20,000 in satisfaction of the said notes, and that I would not have paid the same unless the said deed of release had been executed or if I had
194 received any intimation or notice that any fraud or collusion was contemplated in the premises.

6 and 7. Answering to the averments contained in paragraphs numbered six and seven of the said bill, *and* I say as follows: About the 1st of June, 1877, I made the acquaintance of the defendant Jenks. He told me that he had from fifteen to twenty thousand dollars, which he would loan in Washington upon real-estate security. Shortly afterwards I sent him an application made to me by a certain William Baggman, of the city of Washington, District aforesaid, for a loan of $15,000. The defendant Jenks replied that he would make the loan if the title to the proposed security was perfect and the value of the property sufficiently great to justify the loan. Having known the defendant John Hitz for some time, and having confidence in his judgment as a business man with respect to the value of real estate in the city of Washington, District aforesaid, I applied to him for advice and information as to the real value of the property offered by the said Baggman as security. As a result of this consultation with the defendant Hitz, and also in consequence of information received from other sources, I declined to lend the said Baggman the sum of $15,000 which he desired. A few days after this I casually met the defendant Hitz and he proposed to borrow from me the sum of $20,000 and to secure the loan by a first deed of trust upon lot 3 and part of lot 2, in square 405, in the said city of Washington. I understood from the defendant Hitz that the German-American national bank, of which he was at that time the president, had inherited from the German-American savings bank a large amount of real-estate securities, which he desired to con-
195 vert into cash in order to relieve the necessities of the former institution. I then notified the defendant Jenks of this application, and on the 18th day of June, 1877, he sent me his duly certified check on the Girard National Bank of Philadelphia for the sum of $20,000 and instructed me to make the loan after a proper examination of title. I accordingly employed Messrs. Ashford and Hopkins, members of the bar of this court and gentlemen especially engaged in the examination of titles to real estate in the said District, to examine and report upon the title to the premises aforesaid. Their report, the original whereof is filed herewith, marked Exhibit R. W. T. No. 1 and prayed to be read herewith, showed the title to the said premises good in the defendant Jane C. Hitz, subject to the deed of trust set forth in paragraph numbered three of the said bill, and subject also to a certain outstanding dower interest vested in one Shanks. I was informed by the defendant John Hitz that the

said Shanks was over eighty years of age, and that he had settled an annuity upon her in settlement of her said right of dower. Upon consultation with the said Ashford and Hopkins they informed me that they could find no sufficient record of any release of the said right of dower, but that, in view of the age of the claimant of the said dower right, they would advise me to make the loan. Thereupon I went over to Philadelphia, saw the defendant Jenks, submitted to him the report of the said Ashford and Hopkins, and consulted with him in regard to the advisability of making the said loan. As the result of this consultation I was instructed by him to make the loan. I accordingly returned to Washington and informed the defendant John Hitz that the loan could be made. He
196 then told me, as in fact he had previously done, that he desired the loan to be made in the name of a third person in order that his own name might not appear upon the public records of the District and in the daily press as a borrower of money, because of his connection with the said bank. I consulted the said Ashford and Hopkins in regard to the proposed intervention of a third person, and was informed by them that there was no legal objection to the said intervention. I thereupon consented to the said change for the sole purpose of gratifying the defendant Hitz, who enjoyed a high reputation in the community for probity and honesty, I having no personal interest whatsoever in the method of the loan and no knowledge of the motives of the said Hitz save as stated above. Accordingly the said Hitz had prepared a deed of release of the trust set forth in the paragraph numbered three of the said bill and the deed in fee from the defendants John Hitz and Jane C. Hitz to the defendant Sarah L. Crane.

These conveyances were submitted to the said Ashford and Hopkins, examined by them, and reported to be correct in form. The said Ashford and Hopkins then prepared, at my request, a deed of trust from the defendant Crane to myself as trustee upon the said premises, securing the payment of a promissory note for the sum of $20,000, dated June 18, 1877, made by the defendant Crane, payable to the order of the defendant John Hitz three years after date, with interest at the rate of eight per cent. per annum, payable quarterly. This note was endorsed with waiver of demand and notice by the said Hitz to the defendant Jenks, who now holds the same. These conveyances were all recorded upon the 20th day of June, 1877, and were duly noted
197 upon the abstract of title by the said Ashford and Hopkins.

I then, having acted according to the best of my knowledge and with the advice of my said attorneys and without the slightest suspicion of any defect, either in form or substance, in any of said deeds or of any collusion, fraudulent intent, or improper motive on the part of any of the parties to the said transaction, paid over to the said defendant, Prentiss, the said certificate check. The said Prentiss was at that time the cashier of the said bank. The said check was paid to him in the said bank The said Chipley notes were, as I am informed and believe, at that time in the possession of and were the property of the said bank, and the said check was paid in

Philadelphia to the credit of the said bank. The said deed of release was signed by the said Prentiss, cashier, as aforesaid, as holder of the said Chipley notes.

8. I admit the execution of the deed from the defendant Crane to the plaintiff set forth in paragraph numbered eight of the said bill, and I aver that I was informed by the plaintiff about the time that the said deed was executed that he had taken the property subject to my trust, and that he would have to pay the interest accruing thereunder.

9. I admit the averments of fact contained in paragraph numbered nine of the said bill, but deny the deduction of law therein contained.

10. I admit also the averments contained in paragraph numbered ten of the said bill, and deny the legal inferences therein made. I aver that the advertisement set forth in said paragraph was made in consequence of the direct act of the plaintiff. Five quarterly instalments of interest upon the said loan were punctually paid
198 as they matured, either by or through the said bank. I had not the least suspicion that the instalment maturing December 18, 1878, would not be paid; in fact, the plaintiff had, on more than one occasion, informed me that it would be paid. Upon the morning of December 18th aforesaid I received from the plaintiff a letter notifying me that he would not pay said installment and would resist all attempts to collect either the principal or interest of said debt. I append hereto the said letter, marked "Exhibit R. W. T. No. 2," and ask that it may be made a part hereof. After an interview with the plaintiff, in which he reaffirmed the determination expressed in his said letter, stating that he was acting by advice of counsel, and suggesting that I should proceed to advertise the property under my trust, I went over to Philadelphia to consult the defendant Jenks in the premises. As a result of this consultation, the defendant Jenks, on the 21st day of December, 1878, addressed me a letter directing me as trustee under the said deed of trust to proceed in accordance with the provisions thereof in consequence of default in the payment of interest on the loan secured thereby. I append hereto the said letter, marked Exhibit "R. W. T." No. 3, and ask that it be made a part hereof. I accordingly proceeded to advertise the said property, as is averred in said paragraph numbered ten of said bill.

11. I cannot admit the conclusions of law contained in paragraph numbered eleven of the said bill.

12. I have no knowledge as to any of the matters averred in paragraph numbered 12 of the said bill.

And now, having fully answered all the averments in the
199 said bill contained, I pray to be hence dismissed with my reasonable costs by me in this behalf most wrongfully sustained.

R. W. TYLER.

Duly sworn to.
R. ROSS PERRY, *Solicitor.*

I do solemnly swear that I have read the foregoing answer by me subscribed, and that I know the contents thereof; that the matters therein stated of my own knowledge are true, and that the matters therein stated on information and belief I believe to be true.

R. W. TYLER.

Subscribed and sworn to before me this 25th day of January, A. D. 1879.

R. J. MEIGS, *Clerk S. C. D. C.*,
By C. ROBINSON, JR., *Ass't Cl'k.*

Endorsement: No. 6583, eq. doc. No. 19. B. U. Keyser, rec'r, *vs.* John Hitz *et al.* Separate answer of R. W. Tyler. Filed Jan. 25, 1879.

COMPLAINANT'S EX. No. 7.

Abstract of Title.

Lot 3 and west 30 feet front by a depth of 87 feet of lot 2, in square 405.

David Burns was the original proprietor of this square. In the division between him and the United States commissioners lots 2 & 3 were allotted to the U. S.

July 20, 1796.

U. S. commissioners to Benj. Stoddert. Deed, 9th June, 5th Dec., 1801. Liber G 7, folio 405. Lots 2 & 3.

200 Benj. Stoddert to Luke Wheeler & Jno. Cowper. Deed, 17th July, 5th Dec., 1801. Liber G 7, folio 410. Lots 2 & 3 in trust for Thos. Truxton *et al.*, with full power to sell & convey.

Lot 2:

Wheeler & Cowper to James Campbell. Deed, 25th Nov. 1813; 16 Feb, 1814. Liber A G 32, folio 127. Lot 2. James Campbell died intestate.

Jas., Chas. A., & Victoria Campbell & Jno. R. Alexander *et ux.* to Alex'r W. Campbell. Deed in trust, 12th Jan'y, 8th Feb., 1831. Liber W. B. 34, folio 461. Lot 2. This deed recites that the parties thereto are the heirs & widow of Jas. Campbell, deceased. Conveys in trust to sell & convey for the benefit of the heirs.

Alex'r W. Campbell to David Saunders. Deed, 25 Nov., 1831; 15 Mar., 1832. Liber W. B. 40, folio 101. Lot 2. Conveys in his own right as one of the heirs of Jas. Campbell, dec'd, and also a trustee for the other heirs.

Lot 3:

Wheeler & Cowper to William Willock. Deed, 31 Mar., 7 May, 1812. Liber A C 28, folio 422. Lot 3.

William Willock *et ux.* to Richard H. Douglass. Deed, 18th Sep. 16th Dec., 1828. Liber W. B. 24, folio 123. Lot 3. This deed recites that sales of this and other lots were made to various persons,

and conveys in trust to convey by proper deed upon such persons complying with the terms of the sales.

Shanks *vs.* Hitz. Eq. doc. 8. No. 891. Petition for assignment of dower to the widow of Michael Shanks. Filed March 30, 1867.

201 This cause was referred to the auditor, who, Oct. 27, '68, reported that nothing was due Mrs. Shanks at that time and no further steps were taken with the cause.

Jno. Hitz & wf., Jane C., to Donaldson & Prentiss. Trust, 26 Jan'y, 27th Jan'y, 1876. Liber 805, folio 421. Secure $20,000 to E. P. Halstead, trustee.

We have examined the title to the above-mentioned lot 3 and part of lot 2, in square 405, and find the same good in Jane C., wife of John Hitz, and free of all lien or encumbrance except those noted above.

The collectors of taxes report all taxes paid to date.

Mrs. Shanks, the widow of Michael Shanks, is now 81 years of age, and under our laws the value of her dower interest in the property, assuming her to be in good health, would be, in the event of a sale, $\frac{1}{10}$ of the net proceeds of such sale. Her dower right in this property (which ceases with her death)—

R'd H. Douglass to David Saunders. Deed, 2d Apr., 28 Apr., 1829. Liber W. B. 27, folio 151. Lot 3.

The titles to lots 2 and 3 here unite.

David Saunders to Nicholas Tast. Trust, 8th Oct., 28th Oct., 1834. Liber W. B. 52, folio 230. Lot 3 & W. ½ of lot 2. To secure $660.48 to W. N. Miller for 30 days. This trust was released by the following conveyance·

Nicholas Tast, trus., & David Saunders *et ux.* to Michael Shanks. Deed, 19th Sept., 19th Sep., 1836. Liber W. B. 62, folio 217. Lot 3, west ½ of lot 2.

Michael Shanks conveyed away 13 ft. in depth from the rear end of the west ½ of lot 2. (W. B. 88, folio 420.)

Michael Shanks died intestate, leaving a widow, Catherine,
202 and a daughter, Jane C., wife of Jno. Hitz, his only heir-at-law.

is of very little importance in making a loan, provided ample margin is allowed in point of value.

Continued to date.

THOS. S. HOPKINS.
M. ASHFORD.

The deed of trust to Donaldson & Prentiss has been released and the release filed for record this day; also the following conveyances:

Jane C. Hitz *et vir* to Sarah L. Crane. Deed in fee, dated 16th June and recorded 20 June, 1877.

Sarah L. Crane to R. W. Tyler. Trust, dated 18th June, recorded 20 June, 1877. Lot 3 & west 30 ft. of lot 2, to secure $20,000 to W. P. Jenks for 3 yrs. Int., 8 %, payable quarterly.

The trust to R. W. Tyler is the only incumbrance, except the dower right of Mrs. Shanks.

June 20, 1877.

THOS. S. HOPKINS.
M. ASHFORD.

203 (COMPLAINANT'S EXHIBIT No. 8.)

John Hitz, president; Anton Eberley, vice-pres't; Wm. F. Mattingly, sec.; C. E. Prentiss, cashier; R. M. Potts, ass't cashier.

German-American savings bank.

WASHINGTON, D. C., *December* 18, 1878.

R. W. Tyler, Esq., Washington, D. C.

DEAR SIR: By advice of counsel I shall refuse payment of interest on Jenks' loan, due this day, and will resist all efforts at collection of that loan, principal and interest.

Very respectfully, B. U. KEYSER, *Receiver.*

(Endorsed:) No. 6583, eq. doc. Keyser *vs* Hitz. Separate answer, &c., R. W. Tyler. Filed Jan. 25, 1879.

(COMPLAINANT'S EXHIBIT No. 9.)

Seth Caldwell, president. F. Mitchell, sec'y and treas.

Office Buck Mountain Coal Company, No. 320 Walnut street.

PHILADELPHIA, *Dec.* 21, 1878.

R. W. Tyler, trustee, Washington, D. C.

DEAR SIR: Default having been made in the payment of interest on the note for the sum of twenty thousand dollars ($20,000), drawn by Sarah L. Crane and made payable to the order of John Hitz, and by him endorsed and made payable to my order, said note being dated June 17, 1877, and secured by a deed of trust to
204 you, I have to request that you proceed at once to execute the said trust.

(Signed) W. P. JENKS.

(COMPLAINANT'S EX. No. 10.)

Cross-bill of Jane C. Hitz. Filed Oct. 21, 1879.

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver, &c., *vs.* JOHN HITZ, JANE C. HITZ, ET AL. } Equity. No. 6583.

The cross-bill of the defendant Jane C. Hitz respectfully shows as follows, to wit:

1. That the original bill of complaint in this cause was filed by

the complainant, Benjamin U. Keyser, on the 10th day of January, 1879, against John Hitz and this defendant and Eminel P. Halstead, Robert B. Donaldson, Charles E. Prentiss, William R. Chipley, Sarah L. Crane, W. P. Jenks, and Richard W. Tyler, and that all the parties to the said cause have filed their answers thereto.

2. She further states that she is advised by counsel and believes that the principal object of the said bill is to reinstate a certain alleged deed of trust, bearing date on the 26th day of January, 1876, purporting to have been made by the defendant John Hitz and this defendant to the defendants Robert B. Donaldson and Charles E. Prentiss, the same having been released by a deed of release bearing date on or about the 16th day of June, 1877, mentioned in said proceedings.

3. She was the only child of Michael Shanks, late of the
205 District of Columbia, now deceased, and his sole heir-at-law. The said Michael Shanks died intestate on the 20th day of May, 1864, leaving Catherine N. Shanks, widow, and this defendant, his only child; that said Catherine Shanks departed this life on the 26th day of January, 1879, at the city of Washington. The said Michael Shanks at the time of his decease was seized and possessed of a large estate, both real and personal, and that, among other property, he was seized in his own right and in absolute fee of the property mentioned and described in the bill of complaint and known and distinguished as lot numbered three (3) and the west thirty (30) feet by a depth of eighty-seven (87) feet of lot numbered two (2), in square numbered four hundred and five (405), being improved property on the corner of Ninth and G streets, in the city of Washington, of the value of about $40,000.

(On margin:) That the said Catherine Shanks departed this life on the — day of January, 1879, at the city of Washington.

4. Some time in the year 1872 the defendant John Hitz (who is her husband, to whom she was married on the 5th day of August, 1856), together with the defendant Prentiss and others, organized and set in operation a bank in the city of Washington, known as the German-American savings bank, which was subsequently converted, as she is informed and believes, into what has been recently known as the German-American national bank; that the said John Hitz was president of both the said banks, and that said Prentiss was cashier thereof.

That some time in the year 1875 or 1876 the financial affairs of the said bank became embarrassed and it became important to the credit of said bank that money should be procured for the purpose of relieving its distress; and thereupon, as she believes, and so believing charges, a fraudulent combina-
206 tion and conspiracy was made by and between the said John Hitz, the said Charles E. Prentiss, and other persons to this defendant unknown to procure from her a conveyance of her said separate property, located on the corner of Ninth and G streets, as aforesaid, without any consideration; that in pursuance of the said fraudulent combination the deed of trust mentioned in the said bill of complaint, bearing date on the 26th day of

January, 1876, was procured, and this defendant was fraudulently induced by the said parties in said fraudulent combination to sign and acknowledge the same by fraudulently concealing the nature of the said deed from her. In this connection she refers to and adopts the averments contained in her answer to the original bill in this cause. She further says that the nature and character of the said conveyance was never explained to her at the time of such fraudulent execution or before, and that she never understood that she was making any conveyance of any property belonging to her separate estate; and she further avers that she never was aware of the existence upon the land records of the District of Columbia or otherwise of the said deed until after the failure of the said German-American national bank, and she charges that the said deed of trust purports to have been made to secure two promissory notes signed by one Chipley, dated January 5th, 1876, and made payable to the order of E. P. Halstead, trustee, and she is informed and believes and charges that not only the said Chipley, but the said Halstead, were mere "men of straw" in the transaction and were acting in the interest of the said bank and said conspirators and had no interest whatever in the matter, unless it was for the purpose of gaining favors
207 from the said bank, and she also charges that they were engaged in the said conspiracy to cheat this defendant, or were used, with their consent, for the purpose of consummating such conspiracy; she also charges that said notes, so far as said Chipley and said Halstead are concerned, were a subterfuge and a fraud. She further avers that she never received any consideration whatsoever for the transfer of her title to the said real estate, and that she never has to this day received any consideration whatsoever. She is advised by counsel and believes, and so believing charges, that the said deed of trust is fraudulent and void as to her, and that it ought to be so declared and set aside.

5. Afterwards and some time about the 15th day of June, 1877, as she is informed and believes, another deed was made purporting to convey the said property to one Sarah L. Crane, and that the said deed appears to have been signed and acknowledged by this defendant and by her husband, John Hitz, aforesaid, and she has reason to and does believe and thereupon charges that the said deed last mentioned was in continuation of and for the purpose of carrying out the original scheme and conspiracy hereinbefore mentioned to defraud her of her separate estate without any consideration; that at the time of the making of the last-mentioned deed to the said Sarah L. Crane a deed of release (as mentioned in the bill of complaint) was procured to be signed by the said Donaldson and the said Prentiss of the deed of trust hereinbefore mentioned, but she says she never knew of the existence of the said release until after
208 the failure of the said bank; that the same was never delivered to her or to anybody for her, and that the same was put on record without her knowledge or consent. She further says that at time of the making of the said release and of the said deed to Sarah L. Crane a deed of trust, as she is informed and believes, was executed by the said Sarah L. Crane to the defendant R. W.

Tyler, purporting to be made to secure the payment of a certain promissory note bearing date of the 18th day of June, 1877, for the sum of $20,000, which said promissory note was signed by Sarah L. Crane and was made payable to the order of the said John Hitz for the purpose of fraudulently concealing the nature of said transaction, and was by him endorsed to the order of the defendant W. P. Jenks, of Philadelphia, which deed was recorded on the 20th day of June, 1877. She further charges that the said deed of release, the conveyance in fee of the said property by this defendant and her said husband to Sarah L. Crane, and the deed of trust made by the said Sarah L. Crane to the said R. W. Tyler were all a part of and constituted one and the same transaction; that the said three deeds were put upon record at the same time, and that she is advised and believes that they are all and each of them fraudulent to this defendant, and they ought to be so declared by this court and annulled and set aside; and she further avers that she never received any consideration whatsoever for the alleged conveyance of the said property to Sarah L. Crane, and that the said three deeds herein last before mentioned were made and procured in pursuance and in consummation of the aforesaid combination and conspiracy for the purpose of cheating and defrauding her out of her sep-
209 arate estate. She also avers upon information and belief that the said Sarah L. Crane never received any consideration whatsoever for the execution of the said deed of trust to R. W. Tyler, and that the said Sarah L. Crane was used for the fraudulent purpose of concealing the true character of the transaction, and that the said deed was never delivered to the said Sarah L. Crane or to anybody for her. She further charges that the said defendants, William P. Jenks and Richard W. Tyler, had sufficient notice, actual and constructive, to put them and each of them upon inquiry as to the said conspiracy and the fraudulent character of the said conveyances and transactions at the time thereof, and that said Tyler was the agent of the said Jenks therein. She further avers upon information and belief that the money advanced by the defendant Jenks upon the said note was paid over to the said defendant, Prentiss, to be used for the purposes of said bank or the defendants John Hitz and Charles E. Prentiss, and that no part of it was ever paid to the defendant Crane.

(On margin:) She further avers upon information and belief that the money advanced by the defendant Jenks upon the said note was paid over to the said defendant, Prentiss, to be used for the purposes of said bank or the defendants John Hitz and Charles E. Prentiss, and that no part of it was ever paid to the defendant Crane.

6. She further says that the acknowledgment of the deed of trust, bearing date January 26, 1876, to Donaldson and Prentiss, and the acknowledgment of the deed from this defendant to the said Sarah L. Crane, hereinbefore mentioned, appears to have been taken
210 before one S. F. Austin. At the time when these acknowledgments purport to have been made the said S. F. Austin was the assistant cashier of the said German-American national bank,

and that he was either cognizant of the said combination and conspiracy to cheat this defendant out of her separate estate or he was used for that purpose by those who were in the conspiracy, and that the said Austin never explained to her the character of either of the said papers before taking either of the said acknowledgments, and that she was in entire ignorance of the contents of the said papers. If she had been made aware of the character of either of the said papers she never would have signed them or either of them; that she never had prior to that time conveyed any of her separate estate and was unwilling so to do. She further charges that the said notary, S. F. Austin, purposely and fraudulently omitted to explain to her the nature and character of the said deeds.

7. She further says that the said German-American national bank, on or about the 31st day of October, 1878, closed its doors and was afterwards declared insolvent, and that its affairs are now being wound up by the said Benjamin U. Keyser as receiver thereof; that after the appointment of the said Benjamin U. Keyser, and on or about the 11th day of November, 1878, the said Sarah L. Crane executed, acknowledged, and delivered to the complainant, Benjamin U. Keyser, a deed whereby she undertook to convey to him any equity which she might have in the said property by virtue of the said conveyance to her of June 16, 1877. from this defendant, and she says further that since the last-mentioned deed the said Benjamin U. Keyser has unlawfully, as she is advised and believes,
211 taken possession of the said property, and that he is collecting and has for a long time been collecting the rents thereof, and that he has large sums of money in his hands so collected which this defendant, as she is advised by counsel and believes, is entitled to recover.

8. This defendant says that she inherited from her said father about $117,000 of personal property and somewhere about $180,000 in real estate situated in the District of Columbia; that since the death of her said father, Michael Shanks, she has spent a large portion of her time travelling in Europe, and that she left the said property in charge of her husband, and she finds now, upon examination, that he has lost, by mismanagement and otherwise, very nearly all of her personal property, and that he has procured her, in addition to the property in question in this case, to make a conveyance for his benefit of very valuable property situated on Pennsylvania avenue, and that for his own protection induced her to convey all the realty standing in his name, a large portion whereof had been purchased by him with her separate funds, and the title thereto was taken in his own name.

9. She further says that on the 9th day of December, 1878, and soon after the failure of the said German-American national bank, this defendant and the said John Hitz joined in a conveyance whereby they conveyed in due form of law to William G. Metzerott and Samuel Cross, in trust for her separate and sole use, all the real estate which had been inherited by her aforesaid remaining at that time unconveyed; that the said deed was duly signed and acknowledged and was by her recorded on the 17th day of May, 1879, in

Liber 913, page 437; that the said deed was made and deliv-
212 ered in consideration of the large sum of money which the said John Hitz had lost belonging to her separate estate, and also in consideration of her joining him in a conveyance of real estate standing in his name to the said Benjamin U. Keyser, in order to secure the payment of such debts as might be found due from the said John Hitz to the said German-American national bank, and in further consideration of the conveyance of her absolute fee in certain property of the value of about $15,000, known as the New York restaurant, situated on Pennsylvania avenue, to satisfy in part certain creditors of the said John Hitz.

Prayers.

And she therefore prays as follows:

1. That she may have leave to file this cross-bill, and that a writ of subpœna may be issued to each of the above-named parties to this cause requiring them to answer the exigencies of this cross-bill.

2. That the said deed of trust purporting to have been made by her to Robert B. Donaldson and Charles E. Prentiss, bearing date on the 26th day of January, 1876, and the said conveyance, bearing date on the 16th day of June, 1877, from this defendant and John Hitz, her husband, to Sarah L. Crane, may be declared fraudulent and void as to the rights and interest of the defendant, and that they may be set aside.

3. That the deed of trust made by the said Sarah L. Crane to the said Richard W. Tyler may be declared null and void, and that the same may be set aside.

4. That the said deed of conveyance made by the said Sarah L. Crane to the said Benjamin U. Keyser, bearing date on the
213 11th day of November, 1878, may be declared null and void as to the rights and interests of this defendant and may be set aside, and that this defendant may be put in possession of said property.

5. That the said Benjamin U. Keyser may be required to account for the moneys which he has collected from the said property in controversy, and that the same may be paid over to this defendant for her separate use and benefit, an- also that she may have a decree against the assets of the said bank for the damages resulting to her through the wrongful action of its officers.

6. That the said property on the corner of Ninth and G streets may be conveyed to trustees for her sole and separate benefit, as of right it ought to be, so that it may not be interfered with by her said husband, John Hitz, or seized upon or molested by any of his creditors.

7. She also prays that she may have such other and general relief as may be agreeable to equity and good conscience.

JANE C. HITZ.

ENOCH TOTTEN,
Solicitor for Jane C. Hitz.

The other parties to this cross-bill are Benjamin U. Keyser, John Hitz, Eminel P. Halstead, Robert B. Donaldson, Charles E. Prentiss, William R. Chipley, Sarah L. Crane, William P. Jenks, and Richard W. Tyler.

Duly sworn to.

214 DISTRICT OF COLUMBIA, *County of Washington*, } ss:

Jane C. Hitz, being duly sworn, deposes and says that she has read the foregoing cross-bill by her subscribed and knows the contents thereof; that the facts therein stated upon personal knowledge she knows to be true, and that the facts therein stated upon information and belief she believes to be true.

——— ———.

Subscribed and sworn to before me this — day of October, 1879.

——— ———.

Endorsement: Equity. No. 6583. Benjamin U. Keyser, receiver, &c., *v.* John Hitz *et al.* Cross-bill of Jane C. Hitz. Enoch Totten, sol'c'r. Filed Oct. 21, 1879.

(COMPLAINANT'S EXHIBIT #11.)

Amendment to the Cross-bill of Jane C. Hitz.

Filed November 13, 1880.

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver, *v.* HITZ ET AL. } Equity. No. 6583.

The said Jane C. Hitz, by leave of the court first had and obtained, amends her cross-bill by adding thereto and inserting therein, between the sixth and seventh paragraphs thereof, the following, to wit:

6½. She further says that she is informed and believes, and
215 therefore charges, that after she had been fraudulently induced to sign and acknowledge the said deed dated June 16th, 1877, as aforesaid, purporting to convey said property to said Crane, said paper-writing or "deed" was wrongfully and fraudulently altered in material parts thereof by inserting after her name, where it first occurs in said deed, the words and figures following, to wit, "and John Hitz, her husband, of the said city of Washington, D. C.," and by erasing various words and inserting others in lieu thereof, which fraudulent alterations were made in pursuance of the following endorsement put and still appearing upon said deed, to wit, "Ashford and Hopkins think it advisable" that Mr. Hitz should be made a party to this deed, inasmuch as Mrs. Hitz ac

quired title before the date of the married woman's act, and the said paper-writing styled a "deed," after having been so fraudulently altered, was or was pretended to be signed and acknowledged by the said John Hitz; of all of which the said defendant, Jenks, is chargeable with notice, actual and constructive.

JANE C. HITZ.

Duly sworn to.

DISTRICT OF COLUMBIA, *County of Washington*, } *ss*:

Jane C. Hitz, being first duly sworn, says that she has read the foregoing amendment to her cross-bill by her subscribed, and that the said averments therein are true according to her information and belief.

JANE C. HITZ.

Subscribed and sworn to before me this 13th day of No-
216 vember, 1880.

R. J. MEIGS, *Clerk, &c.*,
By R. J. MEIGS, JR., *Ass't Cl'k.*

Endorsement: Equity. No. 6583. Keyser, receiver, *v.* Hitz *et al.* Amendment to cross-bill. Affidavit of Jane C. Hitz. Enoch Totten, sol'c'r for Jane C. Hitz. Filed Nov. 13, 1880.

(COMPLAINANT'S EXHIBIT No. 12.)

In the Supreme Court of the District of Columbia, the 22nd Day of January, A. D. 1879.

BENJAMIN U. KEYSER, Receiver, *vs.* JOHN HITZ ET AL. } No. 6583, Eq. Doc.

Filed Jan. 25, 1879.

The separate answer of the defendant William P. Jenks to the bill of complaint of the above-named plaintiff.

This defendant, not waiving any right of exception to the numerous errors and imperfections in the plaintiff's said bill contained, but expressly insisting thereon, and claiming the said benefit therefrom which he would have upon demurrer or proper plea, for answer unto so much of the said bill as he is advised that it is necessary for him to make answer unto, answering separately, saith:

I have no information or knowledge in regard to the matters averred in the said bill and can make no answer thereunto save as hereinafter set forth.

During the month of June, 1877, I had a sum of twenty thou-
sand dollars which I desired to invest and which I author-
217 ized the defendant Richard W. Tyler, an insurance agent doing business in the said District of Columbia, to invest for

me. I was first informed by the said defendant that he proposed lending $15,000 of this money to a certain Mr. Baggman, but he subsequently became dissatisfied with the security offered and refused to make the loan. Shortly after that said defendant informed me that he could invest the said sum to advantage in a real-estate loan upon the property described in the said bill, being lot 3 and part of lot 2, in square 405, in the city of Washington, District of Columbia. About the 19th day of June, 1877, the said Tyler came over to Philadelphia, my place of residence, and showed me the abstract of title to the said property. I examined this, and after some conversation with him in regard to the title and the advisability of the investment I authorized him to make the loan.

On the 18th day of June, 1877, I had sent the said Tyler my check for $20,000, a copy whereof is annexed hereto, which has been returned to me through the Girard national bank as having been by it paid on account of the German-American National Bank of Washington, D. C., and is endorsed by its cashier, the defendant Prentiss. The interest upon this loan is at the rate of 8 per cent. per annum, and is payable quarterly. The instalments of interest were paid promptly to me as they matured until the 18th day of December, 1878. A day or two after that date the defendant Tyler came over to Philadelphia and showed me a letter which he had received from the plaintiff, refusing to pay the instalment of interest then due, and announcing that all efforts to collect either principal or interest would be resisted. I was greatly astonished at this proceeding on the part of the plaintiff, my money having
218 been loaned in good faith, without notice of any defect or irregularity of any sort whatsoever, and having been paid to the very bank of which the plaintiff is receiver. On the 21st of December, 1878, I gave written instructions to the defendant Tyler, trustee under the deed of trust securing my loan and set forth in the said bill, to proceed to a sale, in accordance with the provisions of said trust. I have no other or further knowledge in the premises.

And now, having fully answered, I pray to be hence dismissed with my reasonable costs by me in this behalf most wrongfully sustained.

(Signed) W. P. JENKS.

Duly sworn to.

(Signed) R. ROSS PERRY,
Solicitor for Defendant.

I do solemnly affirm that I have read the foregoing answer by me subscribed and that I know the contents thereof; that the matters therein stated of my own knowledge are true, and that the matters therein stated on information and belief I believe to be true.

W. P. JENKS.

Subscribed and affirmed to before me this 23d day of January, A. D. 1879.

A. N. MORTON,
Notary Public.

STATE OF PENNSYLVANIA, } ss:
County of Philadelphia, }

I, William B. Mann, prothonotary of the court of common pleas of said county, do certify that A. N. Morton, Esquire, before
219 whom the annexed acknowledgment was made, was at the time of so doing duly commissioned and qualified to administer oaths and affirmations and to take acknowledgments, &c., and to all whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere, said court being a court of record, and that I am well acquainted with the handwriting of the said A. N. Morton, notary public, and verily believe his signature thereto is genuine.

And I further certify that the said instrument is executed and acknowledged in conformity with the laws of the State of Pennsylvania.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 23rd day of January, in the year of our Lord one thousand eight hundred and seventy-nine.

WILLIAM B. MANN,
Prothonotary.

Endorsement: No. 6583, eq. doc. Keyser *vs.* Hitz. Separate answer of defendant W. P. Jenks. Filed Jan. 25, 1879.

COMPLAINANT'S EXHIBIT NO. 13.

Decree.

In the Suprome Court of the District of Columbia, Special Term, 1881.

B. U. KEYSER, Receiver, &c.,
vs.
JOHN HITZ, JANE C. HITZ, ET AL. } Equity. 6583.

This cause having come on to be heard on the pleadings
220 and evidence, and having been argued by counsel, it is, this 28th day of November, 1881, ordered, adjudged, and decreed as follows:

1. That the two notes mentioned and described in the original bill and proceedings in this cause as made by one William R. Chipley, for the sum of $10,000 each, bearing date January 5th, 1876, have been paid in full, and that the deed of release to the defendant Jane C. Hitz, executed and acknowledged by the defendants Donaldson and Prentiss, bearing date June 16, 1877, and recorded in Liber 857, folio 408 *et seq.*, of the land records of the District of Columbia, is a valid release and discharge of the premises mentioned and described therein of and from the deed of trust made by John Hitz and wife, dated January 26, 1876, and recorded in Liber 805, folio 421, of said land records, to secure the payment of the said two notes.

2. That the deed mentioned and described in the said bill of

complaint and the proceedings herein, made by Jane C. Hitz and John Hitz to Sarah L. Crane, and dated on the 16th day of June, 1877, recorded in Liber 857, folio 409, of *of* the land records of the District of Columbia, is null and void as to the said defendant, Jane C. Hitz, and that the same be, and it hereby is, set aside and annulled as to all the rights and interests of the said defendant, Jane C. Hitz.

3. That the deed of trust bearing date June 18, 1877, made by Sarah L. Crane to R. W. Tyler, mentioned and described in the proceedings herein, and recorded in Liber 857, folio 411, of the said land records, is good and valid and may be enforced in pursuance of the powers therein contained, so far as said deed of trust relates to any and whatsoever interest the said defendant, John
221 Hitz, may have had by reason of his marital relations with said Jane C. Hitz in and to the property in controversy and mentioned and described in the said deed of trust and in the proceedings in this cause, and the injunction granted and issued on the 21st day of February, 1879, is hereby dissolved, so far as it relates to the said interest of John Hitz, but that the said deed is null and void as to any and all the rights and interests of the defendant Jane C. Hitz.

4. That the deed of conveyance bearing date on the 11th day of November, 1878, and recorded in Liber 902, folio 153, of the said land records, made by the said Sarah L. Crane to B. U. Keyser, receiver of the German-American National Bank of Washington, District of Columbia, was and is null and void from its delivery, and that the same be, and it hereby is, set aside and cancelled as well as the record thereof.

5. That the complainant in this cause, B. U. Keyser, receiver, &c., be, and he hereby is, ordered and directed to account to this court for whatsoever sums of money he may have collected arising out of said property in question since the same came into his possession, and that he immediately surrender the possession of said property to Richard W. Tyler, who is hereby appointed receiver, to take possession of and rent and manage the same and to collect the rents and profits thereof and apply the same, so far as may be necessary, to the payment of taxes, insurance, and other expenses needed to keep the said property in tenantable condition until the further order of the court, and that before entering upon the performance of his duties as such receiver he give bond in the penal sum of five thousand dollars, with a surety or sureties to be approved by the court or one of the justices thereof, condi-
222 tioned for the faithful discharge of the trust hereby reposed in him, and that he make report to the court from time to time of the manner of his execution thereof.

6. It is further ordered, adjudged, and decreed that the complainant pay the costs of this suit to be taxed by the clerk, and from this decree the complainant and Jane C. Hitz and William P. Jenks pray their respective appeals to the general term of this court, and the same are allowed.

By the court:

A. WYLIE.

(COMPLAINANT'S EXHIBIT No. 14.)

In the Supreme Court of the District of Columbia.

B. U. KEYSER, Receiver,
vs.
JOHN HITZ ET ALS. } Equity. 6583.

Filed Dec. 15, 1881.

This case coming on to be heard on complainant's motion for a supersedeas in the above cause pending the final decision of the cause or appeal to the general term, it is by the court, this 15th day of December, A. D. 1881, ordered that the complainant bring the rents and profits of the real property in controversy accruing after the first day of December inst. from month to month into the registry of this court and file his bond as receiver of the German-American national bank in the penalty of five thousand dollars,
223 conditioned for faithful compliance with this order, and thereupon the execution of the decree herein so far as it transfers the property to the receiver therein named be staid until final decision, as aforesaid.

By the court:

A. WYLIE.

Endorsement: 6583, equity doc. 19. Keyser *v.* Hitz *et als.* Order staying execution, &-. Filed Dec. 15, 1881.

(COMPLAINANT'S EX. No. 15.)

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver of the German-American National Bank of Washington, Complainant,
vs.
JOHN HITZ ET AL., Defendants. } Equity. No.—, Docket —.

Know all men by these presents that I, Benjamin U. Keyser, receiver of the German-American National Bank of Washington, by authority of the Comptroller of the Currency of the United States, evidenced by his letter bearing date December 13, 1881, and hereunto annexed, am held and firmly bound, as receiver aforesaid, unto the United States of America in the full sum of $5,000.00; to the payment of which, well and truly to be made, I do hereby bind myself, as receiver aforesaid, and my successors.

224 Whereas the above-named obligor has prayed an appeal from the decree pronounced in the special term in the above-entitled cause on the 28th day of November, 1881, to the general term of said court; and

Whereas the said special term, by order passed in said cause the

15th day of December, 1881, superseding the execution of said decree so far as it relates to the collection of the rents and profits of the real property in controversy accruing on and after the 1st day of December, 1881, required the above-named obligor to pay into the registry of this court from month to month the aforesaid rents and profits accruing as aforesaid:

Now, the condition of this obligation is such that if the above-named obligor shall well and truly perform and comply with the requirements of said order and pay said rents and profits into the registry of this court, as therein required, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

In testimony whereof the above-named obligor has hereunto set his hand and seal this 16th day of December, A. D. 1881.

BENJAMIN U. KEYSER, [SEAL.]
Receiver German-American Nat. Bank of Washington.

Approved:
A. WYLIE, *Justice.*

Endorsement: 6583, eq. doc. 29. Keyser *v.* Hitz. Bond of complaint on appeal to G. T. Filed Dec. 21, 1881.

225 COMPLAINANT'S EX. NO. 16.

1518, W. B. G. TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *December* 13, 1881.

SIR: I am in receipt of your letter of this date in reference to giving a supersedeas bond as receiver in the case of Keyser *v.* Hitz, to enable you to collect the rents of the Hitz property.

You are authorized, under the circumstances, to give a bond for the amount required. The amount collected may be set apart and not distributed among the creditors until the pending litigation is settled.

Very respectfully, JOHN JAY KNOX, *Comptroller.*

B. U. Keyser, Esq., receiver German-American national bank, Washington, D. C.

COMPLAINANT'S EX. No. 17.

Final Decree.

In the Supreme Court of the District of Columbia, in Equity Cause No. 6583, Docket 19.

BENJAMIN U. KEYSER, Receiver, &c., *vs.* JOHN HITZ and Others.	Original Bill.
SAME *v.* SAME.	Amended and Supplemental Bill.
JANE C. HITZ *v.* BENJAMIN U. KEYSER and Others.	Cross-bill.
226 SAME *v.* SAME.	Amendment to Cross-bill.
SARAH L. CRANE *v.* BENJAMIN U. KEYSER and Others.	Cross-bill.

This cause came on to be heard at this term, and was argued by counsel and considered by the court, and the court being of the opinion that the complainant, Benjamin U. Keyser, receiver, as the holder of the notes made by William R. Chipley, is not entitled to any relief, and that the deed of conveyance, dated the 16th of June, 1877, made by Jane C. Hitz and John Hitz to Sarah L. Crane, in fee-simple, conveyed as well the right, title, interest, and estate of the said Jane C. Hitz as of the said John Hitz in and to the real estate and premises in said deed mentioned and referred to, and that there is no equity shown in this cause to prevent or delay the execution — enforcement of the deed of trust dated the 18th of June, 1877, whereby the said Sarah L. Crane conveyed the said real estate and premises to Richard W. Tyler in trust to secure the payment of the debt of William P. Jenks, with interests and costs, as in and by the said deed of trust mentioned and provided, and that the deed of conveyance dated the 11th of November, 1878, from Sarah L. Crane to the complainant and the guaranty made by the said Sarah L. Crane about the same time and endorsed on the notes aforesaid were null and void; and, further, that the complainant, under the said conveyance to him from the said Sarah L. Crane, collected the rents and profits of the said real estate and premises until the said conveyance was annulled by the decree in special term, and after said decree con-
227 tinued to collect the said rents and profits under the order passed in special term on the 15th of December, 1881, au-

thorizing such collection and requiring the rents and profits to be paid into court from month to month, and that in pursuance of such order sundry payments have been made into court, and that for all and singular the said rents and profits the complainant ought to account, but that the said rents and profits are claimed, as the court is informed, by the (said) William P. Jenks as part of the security afforded by the said deed of trust, and by the said Jane C. Hitz as her separate property, and by the complainants as the holder of judgments recovered against the said John Hitz, *as the holder of judgments recovered against the said John Hitz*, and that to enable the said account to be taken and the said claims to be litigated and determined this cause should be retained:

Therefore it is by the court ordered, adjudged, and decreed, this 11th day of December, A. D. 1883, as follows:

First. That the injunction granted on the 21st of February, 1879, enjoining the sale by the said Richard W. Tyler of the said real estate and premises conveyed to him in trust, —, and the same is hereby, dissolved, and that the decree in special term, so far as the same holds that the said deed of conveyance from Jane C. Hitz and John Hitz did not convey the right, title, interest, and estate of the said Jane C. Hitz in and to the said real estate and premises, and so far as the same retains the said injunction in respect of such right, title, interest, and estate of the said Jane C. Hitz, be, and the same is hereby, reversed.

228 Second. That the said deed of conveyance from Sarah L. Crane to the complainant and the guarantee given by the former and endorsed on the aforesaid notes of William R. Chipley are null and void and were so when delivered and given and are hereby ordered to be delivered up to be cancelled.

Third. That the complainant account for all and singular the rents and profits received and which should have been received by him before and since the decree in special term, and that the parties aforesaid claiming the said rents and profits have leave to litigate in this cause and as they may be advised their respective claims, and that for said purposes this cause be, and the same hereby is, retained.

Fourth. That the order passed in special term on the 15th of December, 1881, authorizing the collection of said rents and profits by the complainant, be, and the same is hereby, revoked, and that the said Richard W. Tyler be, and he is hereby, appointed receiver, with power, until a sale shall be made under the said deed of trust, to take and hold possession of said real estate and premises and to rent and manage the same and to collect the rents and profits and apply the same to the payments of the taxes, insurance, and any proper expenses, and it shall be the duty of the said receiver, after such application, to pay from time to time the said rents and profits into court and from time to time to make report to the court of the manner in which he has discharged his trust, and before entering upon the performance of his office as receiver the said Richard W. Tyler shall give bond in the penal sum of five thousand dollars

and with a surety or sureties to be approved by this court or
229 one of the justices thereof, conditioned for the faithful discharge of the trust hereby reposed in him.

Fifth. That the said Jane C. Hitz pay to the parties entitled all costs incurred by and under the amendment of her cross-bill filed on the 13th of November, 1880, so far as the rents and profits for which the complainant is required to account shall, without prejudice to the security of the said W. P. Jenks, be insufficient to pay such costs, and that the complainant pay to the parties entitled all the other costs in this cause.

Sixth. That the decree in special term, so far as the same is in any way inconsistent herewith, be, and the same is hereby, reversed.

Seventh. That this decree is without prejudice to the right of any party entitled to the reversion of the said real estate and premises, or any interest in such reversion, to redeem or to make claim, as such party may be advised, to any balance or portion thereof which, upon a sale under the said deed of trust and the satisfaction of the debt secured thereby, with interest and costs, and of the expenses of sale, may remain in the hands of the trustee.

Eighth. That, save so far as this cause is retained, as above mentioned and decreed, the bill of the complainant, with the amendment and supplement thereto, and the cross-bill of Jane C. Hitz, with the amendment thereto, be, and the same are hereby, dismissed.

It is further ordered, adjudged, and decreed that the following-described original documents now in evidence in this cause be sent up to the supreme court, in addition to the record therein, to wit:

1. The deed bearing date June 16, 1879, from Jane C. Hitz
230 and her husband, John Hitz, to Sarah L. Crane, known in the cause as Exhibit No. 5, and—

2. The "abstract" or notes of title dated June 20, 1877, signed by Thomas S. Hopkins and Mahlon Ashford, and known in the cause as Exhibit No. 10.

From this decree Jane C. Hitz, complainant in her cross-bill and one of the defendants, pray- an appeal to the Supreme Court of the United States, which appeal is allowed.

By the court:

D. K. CARTTER,
Chief Justice.

Endorsement: No. 6583. Equity. Keyser *vs.* Hitz. 4 Minutes of the General Term, 530–533. Filed Dec. 11, 1883.

231 COMPLAINANT'S EX. No. 18.

In the Supreme Court of the District of Columbia, the — Day of ——, 188–.

BENJAMIN U. KEYSER, Receiver, &c.,
vs.
WILLIAM P. JENKS, JANE C. HITZ, ET AL. } Equity. No. 6583.

In error.

Know all men by these presents that we Jane C. Hitz, as principal, and Elias E. White, as surety, are bound unto the above-named William P. Jenks, in the sum of three thousand dollars ($3,000.00), to be paid to the said Wm. P. Jenks, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 31st day of December, 1883.

Whereas the above-named Jane C. Hitz has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia.

Now, therefore the condition of this obligation is that if the above-named Jane C. Hitz, shall prosecute her said appeal to effect and answer all damages and costs if she shall fail to make good her plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

JANE C. HITZ. [SEAL.]
ELIAS E. WHITE. [SEAL.]

Sealed and delivered in presence of—
—— ——.

Approved as a supersedeas bond this 31st day of December, A. D. 1883.

CHARLES P. JAMES, *Justice, &c.*

taken in this

232 (COMPLAINANT'S EX. No. 19.)

Order Referring Cause to Auditor to State an Account and Distribute Fund.

Filed Nov. 13, 1884.

In the Supreme Court of the District of Columbia, in General Term, October, 1884.

BENJAMIN U. KEYSER, Receiver,
vs.
JOHN HITZ ET AL. } Equity. No. 6583.

Order referring cause to auditor to state account and distribute the fund.

The motion of Enoch Totten, solicitor for Jane C. Hitz, for reference to the auditor now coming on, and counsel having been heard, it is this — day of November, 1884, ordered that the said cause be, and the same is hereby, referred to the auditor of the court to state the account of Benjamin U. Keyser for rents which have been collected or which might have been collected by him out of or on account of the premises mentioned and described and involved in the proceedings in this cause, as well before the order of December 15th, 1881, passed by the special term in this cause as after said order, and until the possession of said premises passed out of his hands, and to state said accounts as well in respect of moneys by him paid into court as in respect of the moneys remaining in his hands, and to make such allowances as may be proper.

It is further ordered that the said Benjamin U. Keyser be, and he is hereby, directed to appear before said auditor at such time and times as may be appointed by said auditor and submit his account or accounts, and bring with him such accounts, books, papers, vouchers, and documents as may be in his possession or under his con-
233 trol to enable said auditor to properly state said accounts.

And the said auditor is hereby directed and ordered to report as to the proper distribution, according to law, of such funds as may be found for distribution in the cause, and that in making such distribution he shall inquire and report as to whether or not any taxes should be paid out of said fund, and, if any, how much and for what period or periods of time.

It is further ordered that such audit and distribution shall be made upon the papers, pleadings, proofs, and exhibits used or filed in the cause, and that any party claiming said fund or any part thereof may produce before said auditor such further proof as may be proper to enable him to make the said audit and distribution; which proofs shall be returned with his report.

By the court:

D. K. CARTTER,
Chief Justice.

234 COMPLAINANT'S EX. NO. 20.

Report of Auditor.

Filed Mar. 31, 1885. R. J. Meigs, Cl'k.

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver,
vs.
JOHN HITZ ET AL.

The following decree was passed in this cause in general term on the 13th of November, 1884:

"Ordered that said cause be, and the same is hereby, referred to the auditor of this court to state the account of Benjamin U. Keyser for rents which have been collected or might have been collected out of or on account of the premises mentioned and described and involved in the proceedings in this cause, as well before the order of December 15th, 1881, passed by the special term in this cause, as after said order, and until the possession of said premises passed out of his hands, and to state said account as well in respect of moneys by him paid into court as in respect of the moneys remaining in his hands, and to make such allowances as may be proper.

"It is further ordered that the said Benjamin U. Keyser be, and he is hereby, directed to appear before said auditor at such time and times as may be appointed by said auditor and submit his account or accounts, and bring with him such accounts, books, papers, vouchers, and documents as may be in his possession or under his control to enable the said auditor to properly state said accounts.

"And the said auditor is hereby directed and ordered to report as to the proper distribution, according to the law, of such funds as may be found for distribution in the cause, and that in making such distribution he shall inquire and report as to whether
235 or not any taxes should be paid out of said fund, and, if any, how much and for what period or periods of time.

"It is further ordered that such audit and distribution shall be made upon the papers, pleadings, proofs, and exhibits used or filed in the cause, and that any party claiming such fund or any part thereof may produce before said auditor such further proof as may be proper to enable him to make the said audit and distribution, which proofs shall be returned with his report."

After due notice to all parties in interest I proceeded to execute this order of reference and return herewith the deposition, and exhibits, together with the account filed by the complainant.

In Schedule A, I have stated an account of the rents received by the complainant and the expenditures made by him on account of this property prior to the 15th of December, 1881, showing the balance of the said rents for which the complainant should account as being on hand.

It will be observed by reference to the depositions taken in this

reference that the complainant claims to have collected and received these rents in his capacity of receiver of the German-American national bank, a receivership which he held by designation of the proper officer of the Department of the United States Treasury, and he from time to time disposed of these balances under direction of the Controller of the Currency, the officer of the said department having charge of the national banks in such cases.

In Schedule B, I have stated an account of the rents collected and received by the complainant from and after the 15th of
236 December until the decree passed in general term on the 11th of December, 1883, under which decree Richard W. Tyler was authorized thereafter to collect and receive the said rents until the sale of the said real estate. The balances of the rents for this period—between December 15, 1881, and December 11, 1883—have been from time to time deposited by the complainant in the registry of this court, and a statement of such deposits is made in this schedule, which balances this portion of the account.

In both of these schedules I have allowed the complainant the same commissions that would ordinarily be allowed to a receiver or trustee of the court for the collection and disbursements of rents.

It is asserted on the part of other claimants of the fund that the complainant was acting as receiver under designation of the Government and received a yearly compensation for the discharge of all duties and to include all responsibilities incident to that position, and that therefore he is not entitled to an additional allowance by way of commissions from this fund.

The fact asserted is true that the complainant did receive these rents or take possession of them by virtue of his appointment under the Government, and that he did receive an annual stipend as compensation as such receiver, but it does not clearly appear that the ordinary duties of such receiver would include the collection of the rents in this particular case, and I have therefore allowed the complainant the commission above named.

An additional reason for this allowance is found in the fact that as to a large portion of these rents and during most of the period covered by these accounts he employed agents, or rather
237 continued the employment of agents formerly in charge of the property, and paid in some cases the full amount of the commissions and in others one-half.

I am next directed to report upon the distribution of the balance of the fund arising from the collection of these rents.

As to the balance found in Schedule A, it not being now in the possession of the complainant, I have not undertaken to make any specific appropriation, leaving that portion of the distribution to be passed upon by the courts as involving the relative rights of Mrs. Jane C. Hitz and the complainant.

The rents enumerated in this schedule were collected by the complainant without any authority or appointment from the court, and were taken possession of by him under color of a right or title decreed to be void by the court in general term.

The complainant, having taken possession of the property, filed his bill in this cause seeking to enjoin certain of the defendants from enforcing the provisions of a deed of trust by a sale of the property, and on the 21st of February, 1879, the court in *special term granted* the injunction so asked for upon condition that the complainant, as receiver, should execute and file in this cause an undertaking in conformity with the 41st equity rule. An undertaking executed by the complainant as receiver alone was filed, and he proceeded, pending the progress of the litigation, to collect and receive the rents until the decree passed in special term on the 28th day of November, 1881.

That decree, among other things, directed that the complainant should account to the court for whatever sums of money he might have collected arising out of the said property since the same
238 came into his possession, and that he immediately surrender possession of the said property to Richard W. Tyler, who was thereby appointed receiver, to take possession, rent, and manage the property, and to collect the rents and profits and apply the same, so far as might be necessary, to the payment of taxes, insurance, &c., until the further order of this court.

On the 15th of December following this decree a further order was passed in this cause reciting an appeal to the general term from the decree above mentioned and ordering the complainant to bring the rents and profits of the said property accruing after the 1st day of December, 1881, into the registry of the court, and to file his bond as receiver of the German-American national bank in the penalty of $5,000, conditioned for the faithful compliance with the said order, and that thereupon the execution of the decree above named, so far as it would transfer the property to the receiver therein named, should be stayed until final decision.

Under this order the complainant continued the collection of the rents of the property and deposited the same, as I have stated, in the registry of the court.

The balance of the fund, both that for which the complainant is accountable, as per Schedule A, and that which remains in the registry of the court, as per Schedule B, is claimed by William P. Jenks, a party secured by the deed of trust to Tyler of the 18th of June, 1877, upon the ground that the said trust creditor, having been prevented from enforcing his trust and realizing his debt, is entitled to the rents accruing in the meantime.

239 It has been so uniformly decided by this court that deeds of trust in use in this District do not carry with them any of the rents and profits of the premises conveyed that it is unnecessary for me to cite authority or discuss the proposition. In the case of *the* Shepherd against The Freedman's Savings and Trust Co. and Thompson against Shepherd *et al.*, recently decided by this court in general term, the doctrine, as I have stated it, was reasserted, and in that case the circumstances were rather stronger than in the present one.

The same doctrine has also been held in numerous cases by the Supreme Court of the United States.

It is claimed on behalf of the said William P. Jenks that the fund should be appropriated to the payment of the taxes and assessments which have accrued upon this property pending this litigation and which are unpaid upon the ground that it was the duty of the party collecting the rents to have appropriated them to the keeping down of the taxes and assessments and the preservation of the security; also upon the further ground that the deed of trust to Tyler authorizes the party secured to pay taxes in case of default of the trust debtor, and thereupon the amount so paid and advanced should become and form a part of the principal debt and be secured in the same manner by the said trust.

From the statement of Richard W. Tyler made in this reference it appears that upon the passage of the decree in general term he took possession of this property as receiver and held it in that capacity until the 26th of March, 1884, at which time it was sold under the provisions of the deed of trust of June 18, 1877.

240 The nett proceeds of this sale fall short $4,745.73 of the amount of the indebtedness to William P. Jenks secured by the trust. It is urged on behalf of the trust creditor that if, in addition to this deficiency, the said proceeds of sale are to be applied to the payment of taxes and assessments in arrears, and which were liens upon the property, his loss will reach the sum of seven or eight thousand dollars. It is further claimed that, as the rents of this property, which should have been appropriated to keeping down these taxes and assessments, went into the possession of the complainant, and as the court in general term has decreed the complainant to be accountable for all of these rents, the entire fund arising from these rents, without distinction between that in the registry of the court and that which should be in the hands of the complainant, should be appropriated to the satisfaction and discharge of these taxes and assessments.

Equitably considered, the claim and argument have great force, and, if the court have power, it seems to me that the fund in the hands of the complainant, if realized, should be appropriated in the manner claimed to such extent as might be necessary. This, however, is the extent to which I should make any recommendation in the premises. It is true that under the provisions of the deed of trust the party secured might have paid these taxes and assessments and thereupon have added them to the amount of his principal debt. The result of such a proceeding would have been to swell the amount of his claim by the sum so paid for taxes and assessments, and if the property at the sale should have realized enough to cover the original debt and these additions the proceeds would be so applied.

241 So far as the deed of trust is concerned, the trustee in selling the property had authority to appropriate from the proceeds a sufficient sum to pay all the outstanding taxes and assessments which were liens upon the property, and if the proceeds of sale had been sufficient to pay such taxes and assessment- and the original indebtedness and interest the trust creditor would have been secured from loss.

In this case, however, as in any other case in which the property

when sold fails to realize a sufficient sum to pay both the taxes and debt, the trust creditor suffers the loss of the deficiency, unless in the present instance the court shall see fit to apply the funds in the hands of the complainant to the discharge of these liens. I am very clear that I have no authority to appropriate any portion of the fund in the registry of the court arising from the collection and receipt of rents after the 15th of December, 1881, to the payment of the taxes and assessments accruing prior to that date.

As to the taxes and assessments accruing after the 15th of December, 1881, and prior to the date of the decree in general term transferring the property to R. W. Tyler, as receiver, I think they are a proper charge upon the fund in court, being the proceeds of rental for the same period.

There are two reasons which lead me to this conclusion: First, these rents are here subject to equitable disposition by the court, and as a general principle it may be said that the rents and profits of real estate should be first applied to keeping down all current charges upon the property and protecting and preserving it; but another, and perhaps more available, reason is to be found in the terms of the decree of November 28, 1881, which appointed Richard W. Tyler receiver of the property, with directions to him
242 to take possession and collect the rents and profits and apply the same to the payment of taxes, &c.

It was evidently the intention of the court, as appears from that decree, to appropriate the accruing rents to the current charges upon the property.

When the decree of December 15th, 1881, was passed, suspending the execution of the former decree, it was the evident intention of the court to substitute the deposit of the rents in its registry for the appointment of Tyler as receiver to collect the same, and I think it may be fairly assumed to be the intention of the court that the change in the custody of the rents and profits should not change the appropriation directed by the former decree; in other words, that the rents should be applied to the payment of the taxes and assessments accruing during the period of collection of these particular rents.

I have therefore appropriated from the fund in the registry of the court, as shown in Schedule B, the necessary sum to pay the taxes and assessments accruing during the period covered by this portion of the account.

The remainder of the fund, after payment of the costs of this reference, is, I think, distributable to Jane C. Hitz under the decrees and opinions of the court in general term, and I have so stated the distribution in Schedule D.

JAS. G. PAYNE, *Auditor.*

243 SCHEDULE A.

Account of Rents Collected and Received by the Complainant Prior to the Order of December 15th, 1881.

Collections.		Disbursements.	
1878.			
December	110.00	Repairs	30.90
1879.			
January	110.00		1.75
February	195.00		
March	205.00		49.00
April	285.45		4.25
May	150.00		30.00
June	205.00		150.00
July	165.00		
August	105.00		
September	180.00		1.75
October	168.00		27.00
November	151.07 158.00		35.69
December	400.27		2.80
1880.			
January	216.00		16.88
February	276.50		38.75
March	214.20		123.75
April	207.00		32.27
May	203.00		1.75
June	205.00		52.75
July	164.00		8.75
August	214.00		3.75
September	254.00		2.99
October	245.00		11.87
November	191.00		
December	228.50		3.50
1881.			
January	203.50		35.45
February	287.00		2.10
March	254.00		12.50
April	224.00		23.25
May	175.00		22.41
June	240.00		151.50
July	166.75		10.00
August	189.50		7.50
September	183.33		
October	193.58		

Schedule A—Continued.

Collections.		Disbursements.	
November	228.83		20.25
December	334.58		6.40
		Commissions on collections at 10 per cent	788.60
		Balance	6,175.95
	7,886.06		7,886.06

244 Balance to be accounted for, $6,175.95.

JAS. G. PAYNE, *Auditor.*

SCHEDULE "B."

Account of Rents Collected by the Complainant Subsequent to the Order of December 15th, 1881.

Collections.			
1882.			
January	148.58		52.42
February	227.56		77.12
March	230.58		11.50
April	205.58		11.00
May	140.00		12.25
June	210.00		165.50
July	203.91		26.15
August	193.58		9.90
September	171.16		16.95
October	265.50		20.25
November	213.16		11.15
December	221.58		15.65
1883.			
January	180.00		52.10
February	226.00		15.20
March	233.00		11.65
April	170.00		13.50
May	236.75		16.58
June	157.58		35.50
July	269.98		206.35
August	199.91		23.00
September	250.50		23.00

Schedule "B"—Continued.

Collections.			
October	197.58		50
November	213.16		4.38
December	264.00		
1884.			
January	80.13	Commission on $3,905.08 at 5 per cent. (5 per cent. being included in above disbursements as paid to agent)	195.25
Error	60	Commission on $1,205.36 at 10 per cent	120.53
		Deposited in the registry of the court as follows:	
		465.68	
		728.85	
		1,367.45	
		562.48	
		838.62	
245			3,963.08
	5,110.46		5,110.46

JAS. G. PAYNE, *Auditor.*

SCHEDULE "C."

Account of Taxes and Assessments upon This Property Accruing Prior to January, 1882, *and Those Accruing During the Years* 1882 *and* 1883.

First period.

For the year ending June 30, 1878, with interest from August 13, 1878, at 10 per cent. per annum	239.05	
For the year ending June 30, 1879, with interest from Nov. 25, 1879, at 10 per cent. per annum	483.68	
For the year ending June 30, 1880, with interest at 10 per cent. per annum from Oct 1, 1880	467.30	
For the year ending June 30, 1881, with interest from Sept. 27, 1881, at 10 per cent. per annum	467.30	
For the half year ending Dec. 31, 1881, with interest at 10 per cent. per annum	233.65	
		1,890.98

Second period.

For the half year ending June 30, 1882, with interest from Sept. 26, 1882, at 10 per cent. per annum	233.65	
For the year ending June 30, 1883, with interest from Sept. 25, 1883, at 10 per cent. per annum	467.30	
For the half year ending Dec. 31, 1883, with interest from Sept. 23, 1884, at 10 per cent. per annum	209.86	
		910.81
		2,800.79

JAS. G. PAYNE, *Auditor.*

246 SCHEDULE "D."

Distribution of the Fund in Registry of the Court Deposited by the Complainant.

Amount of deposits			$3,963.08
To clerk's allowance as poundage		39.63	
Auditor's fee, this account and report		35.00	
Depositions		25.00	
Taxes and assessments as follows:			
For half year of 1882	233.65		
Interest to May 1, 1885	60.67		
		294.32	
For 1882 and 1883	467.30		
Interest to May 1, 1885	74.76		
		542.06	
For half year of 1883	209.86		
Interest to May 1, 1885	12.65		
		222.51	
Jane C. Hitz, the balance		2,804.56	
		$3,963.08	$3,963.08

JAS. G. PAYNE, *Auditor.*

(In pencil:)

39.63	
35.00	
25.00	
	99.63
294.32	
542.06	
222.51	
	1,058.89
	$1,158.52
	3,963.08
	1,158.52
	$2,804.56

247 COMPLAINANT'S EX. NO. 21.

Decree.

In the Supreme Court of the District of Columbia, the 13th Day of July, 1885, in General Term.

B. U. KEYSER, Receiver, &c., *vs.* JOHN HITZ ET AL. } 6583, Eq. Doc. 19.

This cause came on to be heard at this term upon the report of the auditor filed herein March 31, 1885, and the several exceptions thereto filed by the plaintiff Keyser and the defendants Jenks and Mrs. Hitz, and was argued by counsel and considered by the court.

And the court being of the opinion that the money in the registry of the court received from the rents and profits of the property in question is applicable as well to the payment of the taxes and assessments that had accrued upon said property prior to the decree passed herein in special term November 28, 1881, as to the payment of those that accrued thereafter—

It is, this 13th day of July, 1885, ordered, adjudged, and decreed that the several exceptions of the defendant Jenks numbered respectively three (3), four (4), five (5), and seven (7) and the exception of the plaintiff Keyser numbered two (2) be, and the same are hereby, sustained, and that the several exceptions of the defendant Jenks numbered respectively one (1), two (2), six (6), and eight (8), and the exceptions of the defendant Mrs. Hitz numbered
248 respectively one (1), two (2), and three, and the exception of the plaintiff Keyser numbered one (1), &c., be, and the same are hereby, overruled.

And it appearing to the court from said auditor's report and the exhibits thereto that the taxes and assessments that had accrued upon said property prior to January 1st, 1879, with interest thereon, will more than absorb the balance of said fund in the registry of the court, after satisfying the costs as taxed by the auditor, amounting to $99.03, and the taxes and assessments and interest thereon, amounting to $1,058.59, allowed by the auditor—

It is further ordered, adjudged, and decreed that the said money in the registry of the court, less the said costs, being $3,363.45, be paid by the clerk to Richard W. Tyler, receiver herein, to be by him receipted for, and forthwith paid and applied towards the satisfaction of all the taxes and assessments and interest thereon mentioned in Schedule "C" of said report of the auditor, for which application and payment he shall be allowed credit in his account as receiver.

And, further, that this cause be, and the same is hereby, referred to the auditor of this court to state the account of the said receiver.

And that the said report of the auditor filed March 31, 1885, save

so far as the same is modified by this decree, be, and the same is hereby, confirmed.

By the court:

WM. M. MERRICK,
Justice S. C. D. C.

Memorandum.

And from this decree Jane C. Hitz appeals to the Supreme Court of the United States in open court.

Certified by—

A. B. HAGNER.

249 COMPLAINANT'S EXHIBIT No. 22.

Lib. 857, fol. 409.

Jane C. Hitz *et vir* to Sarah L. Crane. } Deed. Recorded June 20, 1877.

This indenture, made this sixteenth (16th) day of June in the year of our Lord one thousand eight hundred and seventy-seven, between Jane C. Hitz, of Washington, D. C. and John Hitz, her husband of the said city of Washington, D. C., of the first part, and Sarah L. Crane, of the city of Washington, District of Columbia, of the second part, witnesseth:

That the said parties of the first part for and in consideration of the sum of forty thousand ($40,000) dollars, current money of the United States, to her in hand paid by the said party of the second part, the receipt of which, before the ensealing and delivery of these presents, is hereby acknowledged, have granted, bargained, and sold, aliened, conveyed, and confirmed, and by these presents do grant, bargain and sell, alien, enfeoff, convey, and confirm, unto and to the use of the said party of the second part, her heirs and assigns, forever, all those certain pieces or parcels of land and premises, situate and being in the city of Washington, District of Columbia, and known and distinguished as being all of lot numbered three (3) and the west thirty (30) feet front by a depth of eighty-seven (87) feet of lot numbered two (2) in square numbered four hundred and five (405), together with the rights, easements, privileges, and appurtenances to the same belonging or in anywise thereto appertaining.

250 To have and to hold the said land and premises, with the appurtenances and hereditaments to the same belonging, unto and to the only use and benefit of said party of the second part, her heirs and assigns, forever; and the said parties of the first part, their heirs, executors and administrators, do hereby covenant with the said party of the second part, her heirs and assigns, that the said hereinabove-described land and premises, with the appurtenances, unto the said party of the second part, her heirs and assigns from and against all persons claiming by, through, or under

said parties of the first part or their heirs and assigns, the said parties of the first part and their heirs shall and will forever warrant and defend by these presents; and, further, that any act or deed deemed by counsel learned in the law requisite and necessary the more perfectly to assure unto the said party of the second part, her heirs and assigns, the said land and premises hereinabove granted, the said parties of the first part and their heirs shall and will at all times, at the cost of the persons requesting the same, do perform, execute and deliver.

In testimony whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JANE C. HITZ. [SEAL.]
JOHN HITZ. [SEAL.]

DISTRICT OF COLUMBIA, *To wit:*

I, S. F. Austin, a notary public in and for the county and District aforesaid, do hereby certify that Jane C. Hitz, of Washington, District of Columbia, party to a certain deed bearing date on
251 the sixteenth (16th) day of June, A. D. 1877, and hereto annexed, personally appeared before me in the District aforesaid, the said Jane C. Hitz being personally well known to me to be the person who executed the said deed, and acknowledged the same to be her act and deed; and the said Jane C. Hitz, being by me examined privily and apart from her husband and having the deed aforesaid fully explained to her by me, acknowledged the same to be her act and deed and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and official seal this (18th) eighteenth day of June, A. D. 1877.

S. F. AUSTIN,
Notary Public.

[NOTARIAL SEAL.]

DISTRICT OF COLUMBIA, *ss:*

I, S. F. Austin, a notary public in and for the District and county aforesaid, do hereby certify that John Hitz, of Washington, D. C., party to a certain deed bearing date on the sixteenth day of June, A. D. 1877, and hereto annexed, personally appeared before me in the county aforesaid, and the said John Hitz being personally well known to me to be the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under my hand and notarial seal this twentieth day of June, A. D. 1877.

S. F. AUSTIN,
Notary Public.

[NOTARIAL SEAL.]

Endorsed: Jane C. Hitz *et vir* to Sarah L. Crane. Deed. Liber 857, folio 409.

252 COMPLAINANT'S EX. No. 23.

Liber 857, folio 411.

Sarah L. Crane to R. W. Tyler. } Trust. Recorded June 20th, 1877, 2.20.

This indenture, made this eighteenth day of June, in the year of our Lord one thousand eight hundred and seventy-seven, between Sarah L. Crane, of the city of Washington, District of Columbia, party of the first part, and R. W. Tyler, trustee, of the same place, party of the second part witnesseth: That the said Sarah L. Crane, for and in consideration of the sum of ten dollars, current money of the United States, to her in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, before the ensealing and delivery of these presents, has granted, bargained, sold, aliened, conveyed, and confirmed, and by these presents does grant, bargain, and sell, alien, enfeoff, convey and confirm unto and to the use of the said R. W. Tyler, his heirs and assigns, all those certain pieces or parcels of land and premises situate and being in the city of Washington, District of Columbia and known and distinguished as lot numbered three (3) and the west thirty (30) feet front and running back with that width eighty-seven (87) feet in depth of lot numbered two (2) all in square numbered four hundred and five (405), as the same are known and described upon the plat or plan of said city, together with the rights, easements, privileges, and appurtenances to the same belonging or in anywise thereunto appertaining; to have and to hold the said land and premises, with the appurtenances and hereditaments to the same belonging, unto and to the only use and benefit of said R. W. Tyler, his heirs and assigns, in and upon the trusts, nevertheless, hereinafter expressed and
253 specified of any concerning the same, and to and for no other use, intent, or purpose that is to say, first, to secure the full and punctual payment of one promissory note of even date with these presents for the sum of twenty thousand dollars ($20,000), signed by the said Sarah L. Crane and made payable to the order of John Hitz, and by him endorsed to the order of W. P. Jenks, of Philadelphia, Penna., with waiver of notice and protest, the said note being payable in three years from date, with interest at eight per cent. per annum until paid, interest payable quarterly (being for money loaned by the said W. P. Jenks to the said Sarah L. Crane) and also to secure the payment on demand of any and all sums of money which during the continuance of this trust may be advanced by the holder of said note in keeping and preserving a fire insurance upon the buildings on said above-granted premises to the extent of at least twenty thousand dollars or in payment and discharge of any taxes or assessments, general or special, now charged or assessed against, or which may hereafter and during the continuance of this trust be charged, levied, or assessed against said premises, with

interest on such sum or sums so advanced at the rate of eight per centum per annum from the date of such advance and until default (is) made in the payment of said note or any one quarterly instalment of interest thereon, or in payment on demand of any sum or sums advanced in payment of taxes or insurance as aforesaid or interest thereon as aforesaid, to suffer and permit the said Sarah L. Crane, her heirs and assigns, the said above-granted premises, with the appurtenances, to hold, possess, and occupy, and the issues and profits thereof to receive to her, and their own use, and upon full payment of said notes and sums of money and all interest
254 and costs thereon, and all proper cost of this trust, to release and reconvey to said Sarah L. Crane, her heirs or assigns, at his or their cost and expense, the said above-granted land and premises.

Secondly. Upon default being made in the payment of said note, or any quarterly instalment of interest thereon at the rate aforesaid, or any sum or sums advanced or expended for taxes and insurance as aforesaid, with interest as aforesaid, when demanded, or any cost, charge, or half commissions, incurred or accruing of and concerning this trust, to sell said above granted and described land and premises, or as much thereof as may be necessary, with the appurtenances, at public auction to the highest bidder, upon such terms and at such time and place as to the said trustee shall seem most for the interest of all parties concerned, of all which public notice shall be given by advertisement inserted in one or more newspapers printed and published in the city of Washington, District of Columbia, three times a week for at least three successive weeks, and any sale under this trust may be repeated or postponed from time to time as to the said trustees or trustee acting shall seem most for the interest of all parties concerned, and upon such sale being made, and full compliance with the terms thereof by the purchaser or purchasers, all the right, title, interest, and estate, legal and equitable, whether in possession, remainder, or reversion of said Sarah L. Crane and her heirs in and to the land and premises sold, shall thereafter cease, determine, and be forever foreclosed; and the said party of the second part or his heirs shall convey to such purchaser or pur-
255 chasers, his, her, or their heirs or assigns, the said land and premises so sold, with the appurtenances, in fee-simple, free from all liability on the part of such purchaser, to see to or account for due application of the purchase-money, and out of the proceeds of any such sale or sales the said trustee, after retaining a commission of three per cent. on the gross amount thereof for executing this trust, shall pay, first the proper expenses attending such sale or sales, and all moneys advanced or paid for insurance as aforesaid, or in payment of taxes as aforesaid, with interest thereon at the rate aforesaid; secondly, whatever may remain unpaid of said note, whether due or not, with interest thereon, at the rate aforesaid to the date of payment; and lastly, the surplus, if any, shall be paid over to said Sarah L. Crane, her executors, administrators, or assigns.

In testimony whereof the said Sarah L. Crane has hereunto set her hand and seal the day and year first above written.

S. L. CRANE. [SEAL.]

DISTRICT OF COLUMBIA, *County of Washington,* } *To wit:*

I, S. F. Austin, a notary public in and for the District and county aforesaid, do hereby certify that Sarah L. Crane, party to a certain deed bearing date on the eighteenth day of June, A. D. 1877, and hereto annexed, personally appeared before me in the District aforesaid, the said Sarah L. Crane being personally well known to me to be the person who executed the said deed, and acknowledged the same to be her act and deed.

256 Given under my hand and notarial seal this twentieth day of June, A. D. 1877.

S. F. AUSTIN,
Notary Public.

[NOTARIAL SEAL.]

Endorsement: Sarah L. Crane to R. W. Tyler. Trust. Lib. 857, folio 411.

This is to certify that the within is a true and verified copy of a deed recorded in Liber No. 857, folio 411 *et seq.*, one of the land records for the District of Columbia.

Washington, D. C., January 7, 1879.

GEO. A. SHERIDAN, *Recorder.*

COMPLAINANT'S EX. No. 24.

Liber No. 963, folio 143 *et seq.*

John Hitz *et ux.* to Enoch Totten, Tr. } Deed in trust. Recorded March 9, 1881, 3.10 p. m.

This indenture, made this first day of March, in the year of our Lord one thousand eight hundred and eighty-one between John Hitz and Jane C. Hitz, his wife, of the first part, and Enoch Totten, trustee, party of the second part, all of the District of Columbia, witnesseth:

That for and in consideration of certain conveyances heretofore made and delivered and hereafter to be made and delivered, and in consideration of other valuable considerations had and received by the said John Hitz before the ensealing and delivery of these

257 presents, the receipt whereof is hereby acknowledged, said parties of the first part have granted, bargained, sold, and conveyed, and do by these presents, grant, bargain, sell and convey, unto the said party of the second part, his heirs and assigns, all their right, title, interest, and estate of, in, and to those several pieces and parcels of ground situated and lying in the city of Washington, in the District aforesaid, described as follows, viz., all of lot num-

bered three (3) and the west thirty (30) feet front, and running back with that width eighty-seven (87) feet in depth, of lot numbered two (2), in square numbered four hundred and five (405), as the same are known and described upon the plat or plan of said city of Washington, and also of, in, and to all the pieces and parcels of land, of whatsoever kind or description, and wheresoever situated, of which Michael Shanks died seized, and which they have not heretofore lawfully conveyed, together with the improvements and appurtenances to all said granted premises belonging or appertaining; to have and to hold the same unto and for the only use and behoof of the said party of the second part, his heirs and assigns, forever, in trust, nevertheless, for the sole (and) separate use and benefit of the said Jane C. Hitz for and during the term of her natural life, free from the control of her husband and from any liability for his debts, and to permit her to have the possession, use, and income of said premises, and further to lease, sell, mortgage, convey and otherwise dispose of such premises, or any part thereof, in such manner and for such interests and estates as she may direct and appoint by her instrument of writing under her hand and seal and attested by two witnesses, and whether such direction
258 and appointment be of a testamentary character to go into effect after her death, or otherwise, and in remainder after her death, in the absence of any such direction and appointment or subject thereto, to hold the said premises for the use of the children of said Jane C. Hitz living at the time of her death and the children of any deceased children, so that the latter shall take the same share in said property which their parents would take if living, their heirs and assigns forever.

In testimony whereof the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

JANE C. HITZ. [SEAL.]
JOHN HITZ. [SEAL.]

Signed, sealed and delivered in the presence of—
HUGH T. TAGGART.

DISTRICT OF COLUMBIA, }
County of Washington, } *ss:*

I, Hugh T. Taggart, a justice of the peace in and for the county aforesaid, do hereby certify that John Hitz and Jane C. Hitz, his wife, parties to a certain deed bearing date on the first day of March, in the year eighteen hundred and eighty-one, and hereto annexed, personally appeared before me at the county aforesaid, the said parties being personally well known to me as the persons who executed the said deed, and the said John Hitz acknowledged the same to be his act and deed; and the said Jane C. Hitz, being by me examined privily and apart from her husband and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed and declared that she had
259 willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and official seal this third day of March, A. D. 1881.

HUGH T. TAGGART,
Justice of the Peace. [SEAL.]

(COMPLAINANT'S EX. No. 25.)

Liber No. 1073, folio 323 *et seq.*

Richard W. Tyler, Tr., to Seth Caldwell, Jr. } Deed. Recorded March 27, 1884, 1 p. m.

Whereas default having been made in payment of debt mentioned in a certain deed of trust from Sarah L. Crane, bearing date the eighteenth day of June, A. D. 1877, and recorded in Liber No. 857, fol. 411, *et seq.*, of the land records of the District of Columbia, Richard W. Tyler, the trustee named in said deed of trust, in strict execution of the power in him vested in and by said deed, and after having fully complied with all the requirements of said deed of trust, did, on the 26th day of March, A. D. 1884, in front of the premises, and pursuant to due notice, as required by said deed of trust, expose to public sale the lands and parcels of ground hereinafter particularly described, when and where one Seth Caldwell, Jr., being the highest bidder, became the purchaser of said lands and premises at and for the sum of twenty-nine thousand two hundred dollars ($29,200); and whereas the said Seth Caldwell, Jr., having fully complied with the terms of said sale and paid the whole of
260 the purchase-money in cash, hath become entitled to a conveyance of the land and premises so as aforesaid sold:

Now, therefore, this indenture, made this 27th day of March, in the year of our Lord one thousand eight hundred and eighty-four, between said Richard W. Tyler, as trustee, aforesaid, of the District of Columbia, of the first part, and Seth Caldwell, Jr., of Philadelphia, in the State of Pennsylvania, of the second part witnesseth:

That the said party of the first part, for and in consideration of the recited premises and the sum of ten dollars, current money of the United States, to him in hand paid by the party of the second part, the receipt of which, before the ensealing and delivery of these presents, is hereby acknowledged, hath granted, bargained, and sold, aliened, conveyed, and confirmed, and by these presents, doth grant, bargain and sell, alien, enfeoff, convey and confirm, unto, and to the use of the said party of the second part, his heirs and assigns, forever all those certain pieces or parcels of land and premises situate and being in the city of Washington, District of Columbia, and known and distinguished as all of lot numbered three (3) and the west thirty (30) feet front, and running back with that width eighty-seven (87) feet in depth, of lot numbered two (2), all in square numbered four hundred and five (405), with all buildings and improvements thereon, together with the rights, easements, privileges, and appurtenances, to the same belonging, or in anywise

thereto appertaining; to have and to hold the said land and premises, with the appurtenances and hereditaments to the same belonging, unto and to the only use and benefit of said party of the second part, his heirs and assigns.

261 In testimony whereof the said party of the first part hath hereunto set his hand and seal as trustee aforesaid, the day and year above written.

RICHARD W. TYLER, *Trustee.*

Signed, sealed, and delivered in the presence of—
JOSEPH S. RIDER.

DISTRICT OF COLUMBIA, *To wit:*

I, Joseph S. Rider, a notary public in and for the District aforesaid, do hereby certify that Richard W. Tyler, trustee, party to a certain deed bearing date on the 27th day of March, A. D. 1884, and hereto annexed, personally appeared before me in the District aforesaid, the said Richard W. Tyler being personally well known to me to be the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under my hand and notarial seal this 27th day of March, A. D. 1884.

JOSEPH S. RYDER,
Notary Public.

[NOTARIAL SEAL.]

262 COMPLAINANT'S EXHIBIT No. 26.

Liber 1107, folio 60.

Seth Caldwell, Jr., *et ux.* to William P. Jenks. } Recorded December 17, 1884, 11 a. m. Deed.

This indenture, made this ninth day of April in the year of our Lord one thousand eight hundred and eighty-four by and between Seth Caldwell, Jr., and Sophie C. Caldwell, his wife of Philadelphia, Pennsylvania, parties of the first part, and William P. Jenks, of the same place party of the second part. Witnesseth, that the said parties of the first part, for and in consideration of the sum of twenty-nine thousand two hundred ($29,200) dollars in lawful money of the United States, to them in hand paid by the said party of the second part, at and before the sealing and delivery of these presents the receipt whereof is hereby acknowledged have granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and do by these presents grant, bargain, sell, alien, enfeoff, release and convey unto the said party of the second part, his heirs and assigns, forever, the following-described real estate situate in the city of Washington, District of Columbia, to wit: All those certain pieces or parcels of land and premises known and distinguished as being lot numbered three (3) and the west thirty (30) feet front and running back with that width eighty-seven (87) feet in depth of lot num-

bered two (2), all in square numbered four hundred and five (405) as the same are known and described upon the plat or plan of said city. Together with all the improvements, ways, easements, rights, privileges, appurtenances and hereditaments, to the same belonging or in anywise appertaining, and all
263 the remainders, reversions, rents, issues, and profits, thereof; and all the estate, right, title, interest, claim, and demand whatsoever, either at law or in equity, of the said parties of the first part, of, in, to, or out of the said pieces or parcels of land and premises. To have and to hold, the said pieces or parcels of land and premises, with the appurtenances unto the said party of the second part, his heirs and assigns, to his and their sole use, benefit and behoof forever. And the said parties of the first part, for themselves and for their heirs, executors, and administrators, do hereby covenant, promise and agree to and with the said party of the second part, his heirs and assigns, that they, the said parties of the first part, and their heirs shall and will warrant and forever defend the said pieces or parcels of land and premises and appurtenances, unto the said party of the second part, his heirs and assigns, from and against the claims of all persons claiming or to claim the same or any part thereof, by, from, under or through them or either of them. And further, that they the said parties of the first part, and their heirs, shall and will at any and at all times hereafter, upon the request and at the cost of the said party of the second part, his heirs or assigns, make, execute, deliver and acknowledged all such other deed or deeds, or other assurance in law, for the more certain and effectual conveyance of the said pieces or parcels of land and premises and appurtenances, unto the said party of the second part, his heirs or assigns, as the said party of the second part, his heirs or assigns, or her counsel learned in law shall advise, devise or require.

264 In testimony whereof, the said parties of the first part, have hereunto set their hands and seals on the day and year first hereinbefore written.

SETH CALDWELL. [SEAL.]
SOPHIE E. CALDWELL. [SEAL.]

Signed, sealed and delivered in the presence of—
THEO. D. RAND.
F. MITCHELL.

EASTERN DISTRICT OF PENNSYLVANIA, } ss:
State of Pennsylvania, }

I, Theodore D. Rand, a notary public in and for the city and county in the district aforesaid, do hereby certify that Seth Caldwell, Jr., and Sophia C. Caldwell, his wife, parties to a certain deed bearing date on the ninth day of April, A. D. 1884, and hereunto annexed, personally appeared before me, in the district aforesaid, the said Seth Caldwell, Jr., and Sophie C. Caldwell, his wife, being personally well known to me to be the persons who executed the

said deed, and acknowledged the same to be their act and deed; and the said, Sophie C. Caldwell, being of full age and by me examined privily and apart from her said husband and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and notarial seal this ninth day of April, A. D. 1884.

THEO. D. RAND,
A Notary Public of the State of Pennsylvania and for the City and County of Philadelphia. [NOTARIAL SEAL.]

265 STATE OF PENNSYLVANIA, } ss:
County of Philadelphia, }

I, William B. Mann, prothonotary of the court of common pleas of said county, do certify that Theo. D. Rand, Esquire before whom the annexed acknowledgment was made, was at the time of so doing a notary public in and for the county and State aforesaid, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgements, &c., and to all whose acts as such full faith and credit are and ought to be given as well in courts of judicature as elsewhere, said court being a court of record, and that I am well acquainted with the handwriting of the said Theo. D. Rand, not. public, and verily believe his signature thereto is genuine; and I further certify that the said instrument is executed and acknowledged in conformity with the laws of the State of Pennsylvania.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 12th day of Dec., in the year of our Lord one thousand eight hundred and eighty-four.

WILLIAM B. MANN,
Prothonotary. [COURT SEAL.]

Endorsed.

This is to certify that the within is a true and verified copy of an instrument as recorded in Liber No. 1107, fol. 60 *et seq.*, one of the land records of the District of Columbia.

Washington, D. C., July 13, 1891.

GEO. F. SCHAYER,
[SEAL.] *Dep. Recorder.*

266 COMPLAINANT'S EX. No. 27.

Filed August 4, 1885. R. J. Meigs, Clerk.

In the Supreme Court of the District of Columbia, in General Term.

B. U. KEYSER, Receiver, *vs.* JOHN HITZ ET AL. } No. 6583, Equity Doc. 19.

Report of Receiver.

Agreeably to the decree of July 13, 1885, the undersigned, receiver in the above entitled cause, submits the following report, to wit:

From the beginning of his term of office as such receiver, December 12, 1883, to the date of the sale of the property in question (all of lot 3 and the west 30 feet of lot 2, in square 405), under the deed of trust of June 18, 1877, made to secure W. P. Jenks $20,000, with interest, &c., and recorded in Liber 857, folio 411, of the land records of the District of Columbia, which sale was duly consummated on the 26th day of March, 1884, the gross proceeds of rents collected from the said property amounted to the sum of.....	$709.96
Received from clerk, pursuant to said decree of July 13, 1885.....	3,863.45
Total received.....	$4,573.41

Disbursements.

For repairs on property from December 12, 1883, to March 26, 1884.....	23.78
Commissions on $709.96; rents collected at 10 per cent.....	70.96
267 Taxes from June 30, 1883, to March 26, 1884.....	319.91
" for year ending June 30, 1883, with interest and costs thereon.....	553.05
The same for 1882, with interest and costs thereon.....	599.53
" " " 1881, " " " " "	633.71
Do. 1880, do. do.	692.25
Do. 1879, do. do.	757.61
Do. 1878, do. do.	404.64
Commissions, 3% on $3,863.08.....	115.90
Total disbursements.....	$4,171.34

Balance in hands of receiver, $402.07.

Respectfully submitted.

RICHARD W. TYLER, *Receiver.*

To the auditor.

July 31, 1885.

A true copy.
Test:

R. J. MEIGS, *Clerk*,
By M. A. CLANCY,
Assistant Clerk.

[SEAL.]

268 COMPLAINANT'S EXHIBIT No. 28.

Filed August 4, 1885. R. J. Meigs, Clerk.

In the Supreme Court of the District of Columbia.

B. U. KEYSER, Receiver,
vs.
JOHN HITZ ET AL. } No. 6583, Equity Doc. 19.

Report of Auditor.

By decree passed in this cause in the general term on the 13th of July, 1885, it was referred to the auditor to state the account of the receiver, Richard W. Tyler.

The execution of this order of reference will be found in Schedule A hereto annexed, in which I have charged the said receiver with rents collected and received by him from the property involved in this proceeding from the date of his appointment to the date of the sale of the property under the deed of trust mentioned in these proceedings.

I have also charged him with the fund paid over by the clerk from the registry of the court pursuant to the decree of the general term, as above referred to.

I have given the accountant credit for the payment of the taxes and assessments upon the property as directed by the said decree, together with the cost of ordinary repairs upon the property during the period of his receivership, the usual allowance of 10 per cent. commission upon his collections, and the commission of 3 per cent. upon the amount received from the registry of the court and disbursed in the payment of taxes, &c., as compensation for the receiver's trouble and responsibility in the premises.

The balance remaining in the hands of the receiver I have treated as payable to W. P. Jenks upon account of the deficiency in
269 the payment of his indebtedness by the sale under the deed — trust.

JAS. G. PAYNE, *Auditor.*

SCHEDULE "A."

Account of Richard W. Tyler, Receiver.

DR.

To rents of the property in lot 3 and the west 30 feet of lot 2, in square 405, from December 12, 1883, to the date of sale of the said property, March 26, 1884.....	709.96
Amount received from the clerk of the court, as per decree of July 13, 1885.....	3,863.45
	$4,573.41

CR.

By cost of repairs.....	23.78	
Taxes for 1878 and interest.....	404.64	
Do. 1879 do.	757.61	
Do. 1880 do.	692.25	
Do. 1881 do.	633.71	
Do. 1882 do.	599.53	
Do. 1883 do.	553.05	
Do. 1884 to March 26.....	319.91	
Commissions on collections, at 10%	70.99	
Commissions, fund from registry of court and disbursed, 3%	115.90	
Auditor's fee.....	20.00	
Clerk's cost for this account, &c.....	2.00	
Balance to be paid W. P. Jenks on account of trust indebtedness.....	380.04	
	$4,573.41	$4,573.41

JAS. G. PAYNE, *Auditor.*

A true copy.

Test: R. J. MEIGS, *Clerk*,
[SEAL.] By M. A. CLANCY, *Ass't Cl'k.*

270 "COMPLAINANT'S EXHIBIT No. 29."

No. 6583. Supreme Court of the District of Columbia.

Parties.	Action.	Complainant's solicitor-.	Costs.
Keyser, Ben. U., receiver, &c., German-Am. nat'l bank, *vs.* Hitz, John, and wife, Jane C.; Halstead, Eminel P.; Donaldson, Robert B.; Prentiss, Charles E.; Chipley, William R.; Crane, Sarah L.; Jenks, W. P.; Tyler, Richard W.	Injunction and to reinstate trust.	R. K. Elliot, Leigh Robinson. Defendants' solicitor-. Riddle, Miller, Padgett, for No. 4; R. R. Perry, for Nos. 8 & 9; R. D. Mussey, for Nos. 3, 5, & 7; W. S. Cox, for Nos. 1 & 2; E. Totten, for No. 2.	Clerk..... Marshal..... Examiner..... Depositions ( ). Auditor..... Printer..... Witnesses..... Solicitor.....

Date.		Proceedings.	Clerk's fees.
		Deposit toward costs, $——, by —— ——.	
1879.			
Jan'y	10	Bill and Exhibits A, B, C, D, E, F, G, H, order to file; filed jurat.	
"	"	Restraining order returnable Jan'y 18, '79, M. 14, p. 166, and with spas., 10 copies.	
"	22	Copy bill ordered by R. D. Mussey.	
"	25	Answers (separate) of def'ts Nos. 8 & 9 filed, and one jurat and app. by R. R. Perry.	
"	"	Answer (separate) of def't No. 4 filed, and appearance by Ridd-e, M., & P.	
"	"	Answers (separate) of def'ts Tyler & Jenks, replication to, filed.	
Feb'y	1	Affidavit of C. E. Prentiss filed; jurat.	
"	"	Abstract of title, Exhibit (1) R. W. T. No. —, filed.	
"	3	Spa. & rest of order ret'd—served & summ'd No. 9; summ'd Nos. 1, 2, 3, 4, 5, 7; not to be found, No. 6—Jan'y 13, '79.	
"	4	Appearance of def'ts Nos. 3, 5, 7 ordered by R. D. Mussey, O. B. 7, p. 75.	
"	5	Appearance of def'ts Nos. 1 & 2 ordered by Mr. W. S. Cox, O. B. 7, p. 76.	
"	8	Affidavit of B. U. Keyser in support of motion for injunction filed.	
"	21	Injunction granted upon filing of undertaking, M. 14, p. 217.	
March	4	Injunction undertaking approved and filed.	
"	4	Answer, demurrer or plea; time enlarged until 19th Mar., '79, M. 14, p. 236.	
"	18	Answer, demurrer or plea; time enlarged until April rules, O. B. 7, p. 88.	
April	3	Answer, time for filing enlarged to next rule day, M. 14, p. 288.	
May	26	Answer of def't E. P. Halstead filed.	
"	27	*Pro confesso vs.* def'ts Nos. 1, 2, 5, 7 ordered, M. 14, p. 407.	

Date.		Proceedings.	Clerk's fees.
June	3	Answer by def'ts Prentiss & Crane, motion for leave to file.	
"	"	" " " " allowed to be filed, M. 14, p. 419.	
"	6	Answer, separate, of C. E. Prentiss filed.	
"		" " " S. L. Crane.	
"		Cross-bill filed by def't Sarah L. Crane.	
"	11	Replication to ans. of def'ts 3, 5, 7.	
July	1	Answer (separate) of John Hitz filed.	
"	2	" " " " and Jane C. Hitz, stipulation for filing, filed.	
"	"	Answer (separate) of John Hitz and Jane C. Hitz, notwithstanding *pro confesso*, filed.	
Sept.	8	Replication to answers of def'ts Nos. 1, 2, & 4 filed.	
"	13	Spa. to testify for compl't issued to C. E. Prentiss & S. L. Crane & *pre. cepi.*	
"	18	Answer of Keyser to cross bill filed.	
"	20	Spa. to ans. issued to W. R. Chipley.	
"		" " " " ret'd; service acknowledged.	
"		Answer of W. R. Chipley; jurat.	
"		" replication to filed.	
Oct.	21	Cross-bill of def't Jane C. Hitz; jurat filed; leave to file, M. 15, p. 132.	
Nov.	11	Spa. to ans. issued to R. B. Donaldson, Dr. & Mrs. Hatch, & ret'd ch'g'd.	
"	17	Answer of John Hitz to cross-bill filed.	
"	24	*Spa ad. test.* to Beresford & Mr. & Mrs. Hatch issued & returned charged.	
"	25	Joinder of issue in answer of def't No. 1 to X bill of def't No. 2 filed.	
Dec.	30	Answer of def't Hitz to am'd and supp'l bill filed; jurat.	
271		Deposit toward costs, $——, by —— ——.	
1880.			
Jan'y	3	Answer of Keyser to X bill of Jane C. Hitz filed.	
		Joinder of issue on answer of Keyser to X bill of Jane C. Hitz filed.	
		Amended and supp'l bill—"Let this amended and supp'l bill be filed"—filed.	
		Amended and supplemental bill, answer of def't Jane C. Hitz filed.	
	17	Testimony, time for taking, motion to limit, filed.	
	24	Depositions, vol. 1, by Ex'*rm* Bailey filed.	
		Calendared for Feb'y, '80, sp'l term, by def't No. 2, O. B. 7, p. 166.	
	29	Answer, separate, to cross-bill by R. W. Tyler.	
"		" " " " Wm. P. Jenks.	
April	13	2 notes, each for $10,000, marked Exhibit- 1 & 2 with compl't's testimony, filed by E. A. Bailey and put in N. S. D. Co. vault.	
	14	Testimony (vol. 2) by Examiner Bailey filed.	
	24	" (vols. 3, 4, 5) by Examiner Bailey filed.	
May	18	" time to limit, motion for notice of, filed.	
"		" " limit to 1st Tuesday in June, M. 15, p. 552.	
June	1	" extension of time to take, motion for, & affidavit in support of, filed; jurat.	
	"	Testimony, extension of time to take, motion for, hearing set for June 4, 1880, M. 16, p. 25.	
	4	Testimony, extension of time to take till June 15, 1880, ordered, M. 16, p. 36.	
	19	Testimony (vol. 6) by Examiner Bailey filed.	

Date.		Proceedings.	Clerk's fees.
	23	Examiner (Bailey's) bill for taking proof, 483.75 { paid, viz., by rec'r,	
	"	" " " " "	
		$156.00; Mrs. J. C. Hitz, $227.50; W. P. Jenks, $98.25, and C. E. Prentiss, $10.00.	
July	9	Decalendar, notice of motion to, filed.	
	16	Recalendared by order of court, M. 16, p. 161.	
Nov.	13	Amendment to cross-bill & aff't of Jane C. Hitz filed; jurat.	
"	17	Stipulations (4) relative to hearing of case filed.	
	19	Amendment to cross-bill, motion for leave to file, overruled, M. 16, p. 384.	
	20	Amendment to cross-bill & remandment of cause, motion for, & aff'ts (3) in support of; jurat.	
		Amendment to cross-bill & remandment of cause, motion for, & aff'ts (3) of T. H. Dorian in support of, & copy.	
		Amendment to cross-bill & remandment of cause ordered, M. 16, p. 384.	
	26	Withdrawal of deed to be lithographed granted, M. 16, p. 399.	
	27	Answer of R. W. Tyler to amendment to cross-bill filed; jurat.	
		Answers (separate) of def'ts 5 & 7 to amendment to cross-bill filed; jurat- (2).	
		Stipulation in lieu of answer, &c., filed.	
		Answer of def't John Hitz to amendment to cross-bill filed; jurat.	
	29	Answer of def't W. P. Jenks to amendment to cross-bill filed.	
Dec.	1	Deposition of S. F. Austin, appointment of Eugene J. Jacobsen to take, M. 16, p. 410.	
	"	*Spa. ad test.* to Jane C. Hitz returned charged.	
	2	Answer of B. U. Keyser to am'd't to cross-bill of Jane C. Hitz filed; jurat.	
	3	*Spa. ad test.* (2) to Geo. T. Neale & Geo. Jones issued & return- ch'g'd.	
	9	Objections to interrogatories to S. F. Austin on behalf of Jane C. Hitz filed.	
	10	Objections to interrogatories to S. F. Austin by def't W. P. Jenks filed.	
	13	Testimony of S. F. Austin, com'n to Eugene T. Jacobson to take, issued.	
	29	Testimony of S. F. Austin, com'n to Eugene T. Jacobson to take, returned, filed, & published.	
272		Deposit toward costs, $——, by —— ——.	
1881.			
Jan'y	17	Opening of testimony, motion for, & notice of motion filed.	
		Certificate of Examiner E. A. Bailey (returning Ex. No. 25) with said exhibit filed.	
Feb.	24	Calendared for March, 1881, sp'l term, by def't, O. B. 8, p. 95.	
April	26	Calendared for May, 1881, sp'l term, by def't, O. B. 8, p. 120, & precipe (27th).	
May	10	Testimony, direct, on am'd cross-bill, filed by Ex'r E. A. Bailey; fee, $75.00; paid.	
"	"	(L. P. Williams appointed to serve subpœna, M. 17, p. 215, on witness C. E. Prentiss.)	
	13	Rescission of order of May 11, 1881, motion for, by def'ts Jenks, Tyler, Prentiss, Halstead, & Crane *for*.	
	16	Affidavits behalf of compl't by B. U. Keyser & E. A. Bailey.	
	16	" " " def'ts by R. D. & Ellen S. Mussey, R. H. Key, & C. E. Prentiss.	
		Evidence in rebuttal on am'd & cross-bills filed by Ex'm'r E. A. Bailey; fee, $10.00.	

Date.	Proceedings.	Clerk's fees.
	Evidence, time for closing (M. 17, p. 221), 15 days.	
18	*Spa. ad test.* to C. E. Prentiss issued & return- ch'g'd; precipe filed.	
June 1	Testimony — behalf def'ts under cross-bill of Mrs. Hitz by A. Harper, ex'm'r, filed; fee, $75.00; p'd.	
	Calendared for June, 1881, sp'l term, O. B. 8, p. 134.	
22	Depositions — behalf compl't- filed by Ex'm'r Linton (fee, $46.75).	
	Depositions — behalf def't filed by Ex'm'r Linton (fee, $6.37).	
Nov. 28	Deed of trust of June 18, 1877, declared null as to Jane C. Hitz.	
	Deed of conveyance of Nov. 11, 1878, declared cancelled.	
	Receiver ordered to account for collections, to surrender possession to R. W. Tyler, substituted as receiver, and compl't to pay costs.	
	Appeal by compl't, by J. C. Hitz, and by W. P. Jenks to gen. term. (M. 17, p. 550.)	
30	Copy decree of Nov. 28, 1881, ordered & issued to R. W. Tyler, receiver.	
Dec. 1	Calendared for Jan'y, 1882, gen. term; precipe of def't Jane C. Hitz.	
5	Bond of receiver, R. W. Tyler, & notice of presentation to court for approval, filed in tin file-box, N. E. side.	
15	Stay of execution, order for (17 M., 591).	
17	Undertaking for appeal by Jane C. Hitz to gen. term filed.	
	" " " " Wm. P. Jenks " " "	
	" " " " Benj. U. Keyser " " "	
1882.		
Feb'y 13	Record, (10) copies, filed by R. K. Elliot.	
Mar. 17	Collections and disbursements, receiver's report of Dec., 1881; Jan'y & Feb'y, 1882, with vouchers & checks (3) for separate months, to wit, for Dec., $96.16; Jan., $150.44, & Feb'y, $219.08; in all, $465.68.	
Aug. 22	Collections and disbursements, receiver's report on for March, April, May, June, & July, with vouchers & check for bal., $728.85.	
273	Deposit toward costs, $——, by —— ——.	
1883.		
Apr. 26	Collections & disbursements—statement for Aug., '82, to Feb'y '83, inclusive, filed by Receiver B. U. Keyser, with vouchers (19) with check for $1,367.45, filed.	
Oct. 1	Collections & statement of receiver for March, April, May, June, $562.48, with vouchers ( ) & checks.	
10	Testimony on amended X bill of Jane Hitz filed in print.	
	Brief for def't Jenks, (10) copies, filed.	
Dec. 11	Decree in gen. term settling rights of parties. 4 M. G. T., 530–533.	
12	Bond of receiver, R. W. Tyler, filed in tin file-box, N. E. side.	
13	Certificate (3) to copies of decree.	
14	Payment of judgments in def't John Hitz, petition of receiver for, filed.	
	Payment of judgments in def't John Hitz, spa. to ans. & copies (4) to def'ts, 1, 2, 7, 8, 9, issued.	
	Payment of judgments in def't John Hitz, spa. to ans. ret'd: Served John & Jane C. Hitz & Richard W. Tyler Dec. 15, '83; W. P. Jenks & Sarah L. Crane not to be found.	
31	Bond, supersedeas, to S. C. U. S., filed.	

Date.		Proceedings.	Clerk's fees.
1884.			
Jan.	2	Copy petition filed Dec. 14, '83, to R. W. Tyler.	
	21	Answer of def't Jane C. Hitz to petition of rec'v'r of Dec. 14, '83.	
Feb'y	5	Answer of def't R. W. Tyler to petition of rec'v'r of Dec. 14, '83.	
Oct.	30	Account and distribution, motion for an order for, filed.	
Nov.	13	Account and distribution, referred to auditor to take. 5 M. Gen. Term, p. 116.	
	29	$838.62, eight hundred thirty-eight 62 dollars for bal. *rents*, B. U. Keyser, receiver, ch'k on Nat'l Bk. Rep.	
1885.			
Jan.	29	*Spa. ad test.* to John Sherman & John Hitz ordered & issued.	
	30	*Spa. ad test.* returned, "Summoned both Jan. 30, 1885."	
Mar.	31	Report of auditor with acc't of receiver & distribution & exhibits (1 p'k'ge) filed.	
April	7	Report of auditor, with exceptions to by Jane C. Hitz, filed. " " " " " " " " Wm. P. Jenks "	
May	4	Costs of reference to be paid out of fund in court. 5 M. G. T., p. 214.	
	6	$60 auditor fee received of clerk's office out of fund. Jas. G. Payne, auditor.	
June	19	Exceptions to auditor's report filed March 31, 1885, by B. U. Keyser.	
July	13	Decree in gen. term affirming in part decree in sp'l term. 5 M. Gen. T., p. —.	
	24	Decree in gen. term affirming in part, copy, issued to receiver.	
	24	3,363.45 received of clerk in pursuance of decree of the 13th July, 1885. Richard W. Tyler, receiver.	
		$117.63, being clerk's office costs; $79 to date as additional deposit, & coms., $38.63, retained out of fund.	
		$420, bal. fund redeposited Nat'l safe dep. vault.	
		Received of clerk's office ($420) four hundred & twenty dollars, remainder of money deposited herein—Richard W. Tyler, receiver—and not appropriated to costs by clerk.	
	31	$79 clerk's costs refunded to Richard W. Tyler.	
Aug.	4	Report of receiver filed.	
		" " auditor on receiver's ac. & 1 pk*g*. vouchers.	
Oct.	30	Bond on appeal to S. C. U. S. filed.	
	18	Certificate accompanying vols. 1 & 2 of testimony delivered to E. Totten is to be sent to S. C. U. S. for use at hearing.	
274			
189–.		Deposit toward costs, $——, by —— ——.	
Feb'y	11	Mandates (2) S. C. U. S. filed.	
		Decree to file mandates & order for execution for costs—G. T. M. 6, p. 210—filed.	
1890.			
June	2	Taxation of costs, motion for reference to sp'l auditor for, filed.	
	16	Taxation of costs, referred to Job Barnard, sp'l auditor, for, filed.	
	25	Withdrawal of certain papers, motion for leave for, filed.	
		" " " " granted. M. 31, p. 159.	
Oct.	27	Rep't of Sp'l Auditor Job Barnard filed.	
	29	" " copy of, ordered & issued to R. D. Mussey.	
Nov.	19	Copy report of auditor filed Aug. 4, 1885, issued to R. D. Mussey.	
	1	Report of sp'l auditor confirmed. M. 31, p. 498.	
1891.			
Mar.	30	Copies of report of receiver & auditor ordered & issued to Enoch Totten.	

I, R. J. Meigs, clerk of the supreme court of the District of Columbia, do hereby certify that the within and foregoing is a true copy of the docket entries made in the cause stated in the caption thereof, numbered 6583, in equity, docket No. 19 of the said court.

Witness my hand and the seal of the said court this 3rd day of April, 1891.

[SEAL.] R. J. MEIGS, *Clerk.*

275 COMPLAINANT'S EX. NO. 30.

I, James H. McKenney, clerk of the Supreme Court of the United States, do hereby certify that the transcript of the record in the case of Jane C. Hitz, appellant, *vs.* William P. Jenks, No. 28, October term, 1887, on appeal from the supreme court of the District of Columbia, was filed and the cause docketed in the said Supreme Court of the United States on the 22d day of July, A. D. 1884, as appears from the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name
[SEAL.] and affix the seal of said Supreme Court, at the city of Washington, this 11th day of July, A. D. 1891.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

COMPLAINANT'S EX. NO. 31.

Supreme Court of the United States.

I, James H. McKenney, clerk of the Supreme Court of the United States, do hereby certify that the transcript of the record in the case of Jane C. Hitz, appellant, *vs.* William P. Jenks, No. 468, October term, 1887, on appeal from the supreme court of the District of Columbia, was filed and the cause docketed in the said Supreme Court of the United States on the 5th day of November, A. D.
276 1885, as appears from the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name
[SEAL.] and affix the seal of said Supreme Court, at the city of Washington, this 11th day of July, A. D. 1891.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

277 COMPLAINANT'S EX. NO. 32.

Filed February 11, 1889. R. J. Meigs, Clerk.

In the Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the District of Columbia, Greeting:

Whereas lately, in the supreme court of the District of Columbia, before you or some of you, in a cause between Benjamin U. Keyser,

receiver of the German-American National Bank of Washington, complainant, and John Hitz, William P. Jenks, *et al.*, defendants, equity. No. 6583, wherein the decree of the said supreme court, entered in said cause on the 13th day of July, A. D. 1885, is in the following words, viz:

"This cause came on to be heard at this term upon the report of the auditor, filed herein March 31, 1885, and the several exceptions thereto filed by the plaintiff Keyser and the defendants Jenks and Mrs. Hitz, and was argued by counsel and considered by the court.

And the court being of the opinion that the money in the registry of the court received from the rents and profits of the property in question is applicable as well to the payment of the taxes and assessments that had accrued upon said property prior to the decree passed herein in special term, November 28, 1881, as to the payment of those that accrued thereafter—

It is this 13th day of July, 1885, ordered, adjudged, and decreed that the several exceptions of the defendant Jenks numbered
278 respectively three (3), four (4), five (5), and seven (7) and the exception of the plaintiff Keyser numbered two (2) be, and the same are hereby, sustained, and that the several exceptions of the defendant Jenks numbered respectively one (1), two (2), six (6), and eight (8), and the exceptions of the defendant Mrs. Hitz numbered respectively one (1), two (2), and three (3), and the exception of the plaintiff Keyser numbered one (1), &c., be, and the same are hereby, overruled.

And it appearing to the court from said auditor's report and the exhibits thereto that the taxes and assessments that had accrued upon said property prior to January 1st, 1879, with interest thereon, will more than absorb the balance of said fund in the registry of the court, after satisfying the costs as taxed by the auditor, amounting to $99.03, and the taxes and assessments and interest thereon, amounting to $1,058.59, allowed by the auditor—

It is further ordered, adjudged, and decreed that the said money in the registry of the court, less the said costs, being $3,363.45, be paid by the clerk to Richard W. Tyler, receiver herein, to be by him receipted for and forthwith paid and applied towards the satisfaction of all the taxes and assessments, and interest thereon, mentioned in Schedule "C" of said report of the auditor, for which application and payment he shall be allowed credit in his account as receiver.

And, further, that this cause be, and the same is hereby, referred to the auditor of this court to state the account of the said receiver.

And that the said report of the auditor filed March 31, 1885, save so far as the same is modified by this decree, be, and the same is hereby, confirmed."

279 as by the inspection of the transcript of the record of the said supreme court, which was brought into the Supreme Court of the United States by virtue of an appeal taken by Jane C.

Hitz agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas at the October term, A. D. 1887, of said supreme court, the death of William P. Jenks, the appellee in this cause, having been suggested, it was ordered that John Story Jenks, William Henry Jenks, and Evan Randolph, executors of William P. Jenks, deceased, be made the parties appellees in this cause;

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and eighty-seven, the said cause came on to be heard before the said supreme court on the said transcript of record and was argued by counsel:

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed with costs, and that the said John Story Jenks, William Henry Jenks, and Evan Randolph, executors of William P. Jenks, deceased, recover against the said Jane C. Hitz for their costs herein expended and have execution therefor.

NOVEMBER 14, 1887.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the sixth day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

280 *Costs of Jenks' Executors.*

Clerk..... $
Printing record .....
Attorney.... .....

Paid.

COMPLAINANT'S EXHIBIT No. 33.

Filed February 11, 1889. R. J. Meigs, Clerk.

In the Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the District of Columbia, Greeting:

Whereas lately, in the supreme court of the District of Columbia, before you or some of you, in a cause between Benjamin U. Keyser, receiver of the German-American national bank, complainant, and John Hitz and Jane C. Hitz, his wife; Eminel P. Halstead, Robert B. Donaldson, Charles E. Prentiss, William R. Chipley, Sarah L. Crane,

William P. Jenks, and Richard W. Tyler, defendants in bill; Sarah L. Crane, complainant, and Benjamin U. Keyser, receiver of the German-American national bank, defendant, in cross-bill, and Jane C. Hitz, complainant, and Benjamin U. Keyser, receiver of the German-American national bank, John Hitz, Eminel P. Halstead, Robert B. Donaldson, Charles E. Prentiss, William R. Chipley, Sarah L. Crane, William P. Jenks, and Richard W. Tyler, defendants, in cross-bill, equity No. 6583, wherein the decree of the said
281 supreme court entered in said cause on the 11th day of December, A. D. 1883, is in the following words, viz:

"This cause came on to be heard at this term and was argued by counsel and considered by the court, and the court being of the opinion that the complainant, Benjamin U. Keyser, receiver, as the holder of the notes made by William R. Chipley, is not entitled to any relief, and that the deed of conveyance dated the 16th of June, 1877, made by Jane C. Hitz to Sarah L. Crane in fee-simple, conveyed as well the right, title, interest, and estate of the said Jane C. Hitz as of the said John Hitz in and to the real estate and premises in said deed mentioned and referred to, and that there is no equity shown in this cause to prevent or delay the execution and enforcement of the deed of trust dated the 18th of June, 1877, whereby the said Sarah L. Crane conveyed the said real estate and premises to Richard W. Tyler in trust to secure the payment of the debt of William P. Jenks, with interests and costs, as in and by the said deed of trust mentioned and provided, and that the deed of conveyance dated the 11th of November, 1878, from Sarah L. Crane to the complainant, and the guaranty made by the said Sarah L. Crane about the same time and endorsed on the notes aforesaid were null and void, and, further, that the complainant, under the said conveyance to him from the said Sarah L. Crane, collected the rents and profits of the said real estate and premises until the said conveyance was annulled by the decree in special term, and after said decree continued to collect the said rents and profits under the order passed in special term on the 15th of December, 1881, authorizing such collection and requiring the rents and profits to be paid
282 into court from month to month, and that in pursuance of such order sundry payments have been made into court, and that for all and singular the said rents and profits the complainant ought to account, but that the said rents and profits are claimed, as the court is informed, by the (said) William P. Jenks as part of the security afforded by the said deed of trust, and by the said Jane C. Hitz as her separate property, and by the complainant as the holder of judgments recovered against the said John Hitz, and that to enable the said account to be taken and the said claims to be litigated and determined this cause should be retained:

Therefore it is by the court ordered, adjudged, and decreed this 11th day of December, A. D. 1883, as follows:

First. That the injunction granted on the 21st day of February, 1879, enjoining the sale by the said Richard W. Tyler of the said real estate and premises conveyed to him in trust, —, and the same is

hereby, dissolved, and that the decree in special term, so far as the same holds that the said deed of conveyance from Jane C. Hitz and John Hitz did not convey the right, title, interest, and estate of the said Jane C. Hitz in and to the said real estate and premises, and so far as the same retains the said injunction in respect of such right, title, interest, and estate of the said Jane C. Hitz, be, and the same is hereby, reversed.

Second. That the said deed of conveyance from Sarah L. Crane to the complainant and the guarantee *and the guarantee* given by the former and endorsed on the aforesaid notes of William R. Chipley are null and void, and were so when delivered and given, and are hereby ordered to be delivered up to be cancelled.

283 Third. That the complainant account for all and singular the rents and profits received and which should have been received by him before and since the decree in special term, and that the parties aforesaid claiming the said rents and profits have leave to litigate in this cause and as they may be advised their respective claims, and that for said purposes this cause be, and the same hereby is, retained.

Fourth. That the order passed in special term on the 15th of December, 1881, authorizing the collection of said rents and profits by the complainant be, and the same is hereby, revoked, and that said Richard W. Tyler be, and he is hereby, appointed receiver, with power, until a sale shall be made under the said deed of trust, to take and hold possession of said real estate and premises, and to rent and manage the same, and to collect the rents and profits and apply the same to the payments of the taxes, insurance, and any proper expenses, and it shall be the duty of the said receiver, after such application, to pay from time to time the said rents and profits into court, and from time to time to make report to the court of the manner in which he has discharged his trust, and before entering upon the performance of his office as receiver the said Richard W. Tyler shall give bond in the penal sum of five thousand dollars, and with a surety or sureties to be approved by this court or one of the justices thereof, conditioned for the faithful discharge of the trust hereby reposed in him.

Fifth. That the said Jane C. Hitz pay to the parties entitled all costs incurred by and under the amendment of her cross-bill,

284 filed on the 13th of November, 1880, so far as the rents and profits for which the complainant is required to account shall, without prejudice to the security of the said W. P. Jenks, be insufficient to pay such costs, and that the complainant pay to the parties entitled all the other costs in this cause.

Sixth. That the decree in special term, so far as the same is in any way inconsistent herewith, be, and the same is hereby, reversed.

Seventh. That this decree is without prejudice to the right of any party entitled to the reversion of the said real estate and premises or any interest in such reversion to redeem or to make claim, as such party may be advised, to any balance or portion thereof which upon a sale under the said deed of trust and the satisfaction of the

debt secured thereby, with interest and costs, and of the expenses of sale, may remain in the hands of the trustee.

Eighth. That save so far as this cause is retained, as above mentioned and decreed, the bill of the complainant, with the amendment and supplement thereto, and the cross-bill of Jane C. Hitz, with the amendment thereto, be, and the same are hereby, dismissed.

It is further ordered, adjudged, and decreed that the following-described original documents now in evidence in this cause be sent up to the Supreme Court in addition to the record therein, to wit:

1. The deed bearing date June 16, 1879, from Jane C. Hitz and her husband, John Hitz, to Sarah L. Crane, known in the cause as Exhibit No. 5, and

2. The 'abstract' or notes of title, dated June 20, 1877, signed by Thomas S. Hopkins and Mahlon Ashford, and known in the cause as Exhibit No. 10.

285 From this decree Jane C. Hitz, complainant in her cross-bill and one of the defendants, prays an appeal to the Supreme Court of the United States, which appeal is allowed."

as by the inspection of the transcript of the record of the said supreme court, which was brought into the Supreme Court of the United States by virtue of an appeal taken by Jane C. Hitz, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, at the October term, A. D. 1887, of said supreme court, the death of William P. Jenks, the appellee in this cause, having been suggested, it was ordered that John Story Jenks, William Henry Jenks, and Evan Randolph, executors of the said William P. Jenks, deceased, be made parties appellees in this cause;

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and eighty-seven, the said cause came on to be heard before the said supreme court on the said transcript of record, and was argued by counsel:

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed with costs, and that the said John Story Jenks, William Henry Jenks, and Evan Randolph, executors of William P. Jenks, deceased, recover against the said Jane C. Hitz for their costs herein expended and have execution therefor.

NOVEMBER 14, 1887.

You, therefore, are hereby commanded that such execu-
286 tion and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the sixth day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Costs of Jenks' Executors.

Clerk ..... $
Printing record .....
Attorney .....
Paid.

287 COMPLAINANT'S EX. No. 34.

Filed June 16, 1890. R. J. Meigs, Clerk.

In the Supreme Court of the District of Columbia, the 2nd Day of June, 1890, in General Term.

B. U. KEYSER
vs.
JANE C. HITZ ET AL. } No. 6583, Equity Docket 18.

The defendant R. W. Tyler shows that by an order made by this court, pursuant to mandates of the Supreme Court of the United States, on or about the 11th day of February, 1889, it was ordered that the defendants herein have execution for their costs, to be taxed by the clerk, and that by reason of sundry cross-bills and other pleadings filed herein and proceedings thereunder the proper discrimination and allotment of costs as between and against the several parties hereto involves an amount of time and labor which it is embarrassing to the other business of the clerk's office to devote to this particular matter.

Wherefore he prays that this case may be referred to a special auditor and master to tax the costs of the respective parties herein, and that said special auditor and master proceed with due dispatch to execute this order and make report thereof to the special equity term.

R. D. MUSSEY,
W. D. DAVIDGE,
For Defendant Tyler.

In the General Term, June 16, 1890.

Ordered that the within case be referred to Job Barnard as special auditor to report the proper distribution of the costs therein
288 among the several parties.

By the court:

A. B. HAGNER, *Justice.*

Report of Special Auditor as to Costs.

Filed October 27, 1890. R. J. Meigs, Clerk.

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver, &c.,
vs.
JOHN HITZ ET AL. } No. 6583. Equity.

This cause having been referred to me, as a special auditor, by an order passed by the court in general term on the 16th day of June, 1890, I qualified as such by taking the oath of office and recording the same in the office of the clerk of said court.

Thereafter I notified the several parties in interest by giving the following notice to the solicitors named:

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver,
vs.
JOHN HITZ ET AL. } No. 6583. Equity.

Having been appointed by the court to report the proper distribution of the costs among the several parties to this suit, I hereby give notice that I will proceed with said duty on Friday, September 26th, 1890, at 1 o'clock p. m., at my office, No. 500 5th St. 289 N. W., in Washington city, at which time and place you are requested to attend and present your several claims.

JOB BARNARD,
Special Auditor.

To Leigh Robinson, solicitor for B. U. Keyser.
Enoch Totten, " Jane C. Hitz.
R. D. Mussey, " Tyler *et al.*

Service accepted September 24th, 1890.
(Signed) LEIGH ROBINSON,
For B. U. Keyser.
" ENOCH TOTTEN.
" R. D. MUSSEY.

That, in pursuance of such notice, the said solicitors appeared at my office at the time appointed and were heard in the matter.

The object of this reference, as I construe the order, is to tax the costs of this suit and to determine to whom and by whom the same shall be paid.

This is the order of reference:

"In the General Term, June 16, 1890.

"Ordered that the within case be referred to Job Barnard, as special auditor, to report the proper distribution of the costs therein among the several parties.

"By the court:

"A. B. HAGNER."

A claim was presented by the defendant W. P. Jenks for the payment of $160.55, paid for printing testimony under the amended cross-bill of defendant Jane C. Hitz. This is not allowed under the rule 90, which states that printing shall be taxed as costs, to wit, "an abstract of the pleadings, not to exceed one-fourth of the
290 number of folios in the original pleadings." Under this rule, a claim of $43.33 is allowed defendant W. P. Jenks, $10 to defendant John Hitz, and $38.33 to defendant Jane C. Hitz.

All the costs taking testimony under the amended cross-bill of the defendant Jane C. Hitz *was* paid by her under the order of the court, and, in addition to that expense, the taxable fees to solicitors of $2.50 for each deposition taken under said amended cross-bill should be taxed to her, amounting to $47.50, there being 19 depositions.

I find 31 other depositions in the cause, the solicitors' fee for attendance on these being $77.50, which is taxed to the complainant. In addition to this, there is a docket fee to defendants' solicitors of $20 taxed against complainant.

The costs paid by the several defendants for taking their testimony under the original pleadings in the cause I have taxed against the complainant.

There is due the clerk of the court additional costs amounting to $75.35, which I have also taxed against the complainant.

I therefore report that the complainant in this cause is chargeable with and should pay the following items of costs, aggregating $618.63, to the parties here named, to wit:

To the defendant Wm. P. Jenks, amount paid by him for taking testimony	$90.25
To same for printing record	43.33
To defendant Jane C. Hitz for taking depositions	227.50
To same for printing record	38.33
To defendant John Hitz for printing record	10.00
291 To solicitors' fee for defendants' solicitors	20.00
To same for attendance in taking testimony, thirty-one depositions	77.50
To clerk of court, additional costs	75.35
To defendant Chas. E. Prentiss for taking depositions	16.37
To auditor's fee for this report	20.00
Total costs taxed against the complainant	$618.63

And that defendant Jane C. Hitz pay to the solicitors of the defendants named in her amended cross-bill, for attendance at the taking of nineteen depositions, 47.50.

JOB BARNARD,
Special Auditor.

292 *Order Confirming Report of Special Auditor.*

Filed December 1, 1890. R. J. Meigs, Clerk.

In the Supreme Court of the District of Columbia.

B. U. KEYSER
vs.
JANE C. HITZ ET AL. } No. 6583. Equity.

It appearing to the court that no exceptions by any of the parties hereto have been filed to the report of the special auditor, which was filed herein October 27, 1890, it is, on the motion of the defendants R. W. Tyler *et al.*, by Mr. Mussey, their solicitor, ordered that said report be, and the same hereby is, in all things finally ratified and confirmed.

By the court:

A. C. BRADLEY, *Justice.*

True copies.
Test: R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS, *Ass't Cl'k.*

293 *Testimony for Defendants.*

Filed August 9, 1898.

In the Supreme Court of the District of Columbia.

HITZ
vs.
JENKS ET AL. } In Equity. No. 12800.

At the request of W. D. Davidge, Esq., solicitor for defendants, I have this day fixed February 8, 1893, Wednesday, 2 o'clock p. m., and his office (room No. 1, Corcoran building, in Washington city, D. C.) as the time and place when and where testimony on behalf of the defendants in the above-entitled cause will be taken.

ALBERT HARPER,
Examiner in Chancery.

February 6, 1893.

To Enoch Totten, Esq., solicitor for complainant:

Take notice that at the time and place fixed in the foregoing order I shall take testimony on behalf of the defendants in the above-entitled cause.

——— ———,
Solicitor for Defendants.

Service acknowledged this 6th day of February, 1893.

ENOCH TOTTEN,
Solicitor for Complainant.

294 FEBRUARY 8, 1893—Thursday, 2 o'clock p. m.

Met pursuant to foregoing notice.

Appearances: W. D. Davidge, Esq., solicitor for the defendants, one of whom, Richard W. Tyler, is present; Enoch Totten, Esq., solicitor for the complainant; also the examiner and—

JOHN A. PRESCOTT, who, being produced as a witness of lawful age for and on behalf of the defendants and being first duly sworn, deposes and says:

Direct examination.

By Mr. DAVIDGE:

Q. Please state your name, your age, occupation, and residence. A. John A. Prescott; fifty-three years of age; real-estate broker; my residence at the present time is in Washington city, D. C.

Q. How long have you carried on the business of a real-estate broker? A. Since May 1, 1881, continuously.

Q. And where? A. Continuously at No. 1416 F street northwest, in this city.

Q. Are you well acquainted with the values of property on F and G streets northwest, say between 9th and 15th streets, in this city? A. Well, I have a pretty good knowledge of the values.

Q. Since you went into the business have you carried it on continuously? A. I should say I had.

295 Q. Do you recollect the sale in March, 1884, of the property at the northeast corner of 9th and G streets northwest, in this city? A. I remember the occurrence very well indeed.

Q. Do you recollect what price that property brought? A. Not from personal knowledge.

Q. You were not at the sale? A. I was not at the sale.

Q. From what you heard at the time, do you recollect what price the property brought? A. From what I have heard, the property brought in the neighborhood of thirty thousand dollars.

Q. Assuming that property brought between twenty-nine thousand and thirty thousand dollars, I wish you would state whether, in your judgment, that was a fair price for the property. A. I never knew of my own personal knowledge the number of square feet contained in the property sold, but learned from information received since the sale that the price it brought would be about a little rise of three dollars a foot. I considered that at the time the sale was made it was a very good price indeed.

Q. Are you acquainted with the property in question? A. I am acquainted with it, not specifically, but because I traveled by it, up and down 9th street, for the past thirty years.

Q. You have, then, some idea of the character of the improvements upon the property in the spring of 1884? A. I have.

Q. In estimating the value of the property, what value would attach or would you have attached to these improvements if

296 you had intended to buy in March, 1884? A. At that time and since then down to the present time I should have only considered the value of the ground itself.

Q. Will you state why? A. Because the improvements were old and of such character as would have had to have been removed from the property in order to make it valuable to a purchaser.

Q. If you had been called upon to sell that property at that time how would you sell it, in bulk or by cutting it up? A. When property of that kind is put up by an auctioneer generally it is offered, I think, in bulk; sometimes in bulk and sometimes by single lots.

Q. Take property in the locality of this; what would be the better way of exposing it to sale?

Mr. TOTTEN: Objected to because Mr. Prescott does not say that he is an expert in that business.

WITNESS: You mean at the present time?

Mr. DAVIDGE: No; in March, 1884.

A. Well, I do not know but what to have offered it for sale as a whole would have been as advantageous as to have subdivided it.

Q. Do you recollect the sale of any property in the neighborhood in question about the time of this sale, say within a year? A. No, sir.

Q. Within about that time, then? A. Prior to that time, namely, the 4th of November, 1882, through my office were sold lots 53, 54, and 55, in square 376, fronting somewhere, I think, about one hundred feet (I am not positive about the frontage) on the south
297 side of G street between 9th and 10th streets northwest, to the National Rifles, which they still own and occupy. The deed passed to them November 4, 1882, and the price of the ground was one dollar and twenty-five cents per square foot.

Q. For whom were you agent in that sale? A. I was the agent for the sale of it.

Q. Who was the vendor? A. Gonzaga college.

Q. Represented by whom? A. Thomas J. Fisher and Co.

Q. Mr. Fisher was a man well acquainted with prices of real estate, was he not? A. Yes.

Q. Second to no man? A. Second to no man in the District.

Q. Do you know of any other sale of property in the neighborhood about that time? A. No, sir; not within a year or two. I made two sales, both of them in 1886, one being next to the northwest corner of New York avenue and 9th street, on November 6, 1886, lots 18, 19, and 20, in square 370, with a frontage on 9th street of about seventy-three feet, I think.

Q. Who owned that property? A. The deed passed from M. Valinda Chapman to Joseph L. McFarland. The price paid for the property was one dollar and seventy-five cents per square foot.

Q. Whom did you represent in that sale? A. I represented M. Valinda Chapman.

Q. The vendor? A. Yes.

Q. Did you regard that as a good price? A. Yes, sir; I
298 called it a very good price. I also made a sale in September, 1886, of lot 36, in square 369, on the west side of 9th street between L and M streets northwest, being twenty-five feet by one

hundred and thirty-eight feet, improved by a very nice three-story brick dwelling-house. The value of the dwelling-house I estimated to have been six thousand dollars, which would leave the ground at four thousand dollars, and I got for the whole of it ten thousand dollars.

Q. How much was that? A. The ground contained three thousand four hundred and fifty feet, which, upon my estimation, after taking out the value of the improvements, would be one dollar and twenty-five cents per square foot.

Q. The National Rifles, I understand, bought three lots in November, 1882. Can you give me the dimensions of those lots 53, 54, and 55, in square 376—that is, about a rough guess? A. I should say that they were about seventy-five feet by one hundred and thirteen feet.

Mr. TOTTEN: You mean seventy-five feet front?

WITNESS: Yes; I think so.

Q. The armory is erected there now? A. Yes.

Q. I want to direct your mind now to prices on F street near the corner of 9th street northwest. Do you recollect when the rise in property on F street began—that is, in what year? A. It began to show appreciation, I think, about 1883.

Q. And did it go on continually increasing in value? A. Yes, sir; from time to time.

Q. Can you recall any sales indicating the value of real
299 estate shortly before 1883? A. In 1880 I think it was Gonzaga college owned several lots on the north side of F street adjoining immediately on the west the Masonic Temple building. Each lot, I think, was twenty feet front. The lot immediately adjoining that building was sold to the Beneficial Endowment Association for two dollars and eighty-five cents per square foot. A little later than that, a few months later than that, I was contemplating going into the real-estate business, and I learned that Thomas J. Fisher & Co. had that property for sale; I went to him to inquire the price of a lot there with a view of purchasing it myself for business purposes, and I was told that the price was three dollars a foot with a very small cash payment and the balance on long time.

Mr. TOTTEN: Objected to because hearsay.

Q. Is the office of Thomas E. Waggaman in that neighborhood? A. It occupies one of those lots I have spoken of.

Q. What did he give?

Mr. TOTTEN (interposing): If you know.

A. I do not know actually. I am pretty positive that he gave three dollars a foot.

Q. Do you know what the Columbia bank gave? A. No, sir; because they subsequently purchased from the Beneficial Endowment Association. I do not know what they gave.

Q. Then the sale to the Beneficial Association you have men-

tioned relates to the same property as is now occupied by the Columbia bank? A. Yes.

Q. These sales were made along about when? A. I should say in about 1882.

300 Q. What would those lots sell for now, in your judgment?

Mr. TOTTEN: You mean F Street lots?

Mr. DAVIDGE: These lots he has been talking about.

A. I think those lots would sell for twenty-five dollars a foot.

Mr. TOTTEN: You mean a square foot?

WITNESS: Yes.

Q. That is, they have gone up eight hundred per cent.? A. They have gone up in price the difference between three dollars and twenty-five per square foot. Yes, sir; eight times three.

Q. Do you recollect any special circumstance that first either led to or indicated the increase in real-estate values on F street? A. Well, the first thing that drew the attention of people to F street particularly was the tendency of merchants to locate upon F street in business. I think that the purchase which Mr. Moses made was one of the first—perhaps the first.

Q. Now, where was the Moses purchase? A. On the southwest corner of 11th and F streets.

Q. Can you recollect in what year? A. I cannot.

Q. About what time? A. I should say about six years ago. About 1887, I should say.

Q. Do you know what Moses gave? A. No, I do not.

Q. Now, I will ask you, Mr. Prescott, when it was that
301 prices on G street advanced. A. I think G street was a dead street up to about 1889.

Q. Was the rise rapid or otherwise? A. Well, the rise when it began was rapid. It was some time developing.

Q. What were prices on G street, let us say in 1890, compared with what they had been five or six years before? A. I cannot say that they had appreciated to any material extent up to 1889 or 1890.

Q. Well, you say that in 1889, as I understood, there was a rise? A. G street began to be looked to as the overflow of F street.

Q. I understood you to say also that when the rise began it was very rapid? A. Yes; and that occurred in 1890, I think.

Q. Well, I want now to find out what you mean by very rapid. A. Well, I can state this of personal knowledge. I think it was in 1889 that the gentleman occupying the premises known as the Cowling stables, on the north side of G street between 13th and 14th streets northwest, came to me and asked me to join him in purchasing the property which he occupied at five dollars a foot. Shortly after that time the property changed hands, at what price I am not quite positive; but since then it has been held at fifteen dollars a foot.

Mr. TOTTEN: Objected to as hearsay evidence.

Mr. DAVIDGE: I think that is all.

WITNESS: I made a sale on F street between 14th and 15th streets northwest in 1886.

302 Q. F street or G street? A. F street.

Q. Well, I will ask you a question about that sale. On F between what streets? A. I made it in March, 1884. The deed passed to Henry A. Willard.

Q. Between what streets? A. Between 14th and 15th streets.

Q. On F street? A. On F street, fronting twenty feet by one hundred feet deep, improved by a two-story brick dwelling-house, for thirteen thousand five hundred dollars, which was between six and seven dollars per foot.

Q. What would that property bring now? A. I should suppose that it would bring now from thirty to forty dollars per square foot.

Cross-examination.

By Mr. TOTTEN:

Q. What is on the ground between 9th and 10th on the south side of G street now—that is, what buildings, what places of business? A. On the south side of G between 9th and 10th streets northwest, first comes the corner stone fronting on 9th street; then comes the building which has been for years occupied by Fischer, the dyer; then the alley, and then comes the McGill building.

Q. That is a carpenter shop? A. No, sir. The McGill building is a large business house—a business and office house.

303 Mr. DAVIDGE: For offices?

WITNESS: Offices. Then comes the property occupied by the National Rifles.

Q. Well, does not Gonzaga hall come in there? A. It comes in west of there.

Q. Then you strike the church property? A. Yes.

Q. Well, what buildings were there in March, 1884? The ground and house belonging to the Catholic church at the southeast corner of G and 10th streets was there, was it not? A. Yes, sir; and then Gonzaga hall.

Q. The National Rifles was not built then? A. No.

Q. That was a vacant lot, where the Gonzaga Hall building is? A. They bought in 1882; they built possibly the next year, 1883.

Q. Then there was a vacant lot where the National Rifles building now stands? A. Yes.

Q. Then comes Gonzaga hall? A. No; west of that.

Q. Then you struck this vacant lot which the National Rifles own? A. Yes.

Q. And then where the McGill building is was a vacant lot? A. Well, there was an old building there, a carpenter shop.

Q. Is there not a carpenter shop standing next to the Mc-

304 Gill building? A. No, sir; not around on G street.

Q. Kept by a man named Darrington? A. I am not positive, but my impression is that the McGill building runs all the way from the National Rifles' building to the alley.

Q. The McGill building has only been built recently? A. Yes.
Q. It is not two years old? A. No.
Q. Then they have torn down the carpenter shop to put up the McGill building? A. Yes.
Q. Is there not a very old residence or house at the corner of 9th and G streets? A. Yes, sir; a store and residence.
Q. Property on that side of G between 9th and 10th has advanced very much in value? A. Yes.
Q. How much? A. I suppose that ground on the south side of G street between 9th and 10th was worth twelve dollars a foot.
Q. Is the other side worth any more? A. I should say that twelve dollars a foot would be about the ruling price for G street between 9th and 10th.
Q. There has been a good deal of rise in property in the last twelve years between K street and the circle up at P street, has there not, on Connecticut avenue? A. Yes.
Q. When did that rise in value take its first start? A. In 1883 or 1884.
Q. Then there was a rise in value about the same time between 14th street and the same circle, at P street, was there not, on
305 Massachusetts avenue? A. There was a rise all up in that neighborhood.
Q. There was a rise all around in that vicinity? A. Yes.
Q. Is there any comparison to be fairly made between property at 9th and G streets and property on 9th between L and M streets, which you have spoken about? A. There is a comparison to be made in this: that up to the time that this corner of 9th and G was sold 9th street was not considered to be a business street practically north of F street.
Q. Well, 9th street was occupied for business purposes north of F street? A. Yes.
Q. There was Freund's building, which he occupies now, there then? A. Yes.
Q. There was a grocery store at the corner of 9th and G streets, next to Freund's, and then on the opposite corner, on this very property in question, there was a tailoring establishment and a dyeing establishment and a good many other things? A. Yes, sir. They occupied those places there the same as you find other localities occupied where really they are not considered to be business localities.
Q. When did you first begin to talk about this property at 9th and G streets for the purpose of estimating its value in 1884—
306 that is, when were you asked to make an estimate? A. I have not been asked to make an estimate of it recently.
Q. You have carried yourself back there for that purpose? A. Yes.
Q. You say that the general rise in values began about 1883? A. Yes.
Q. That extended all over the city to a large extent? A. Yes.
Q. During the years 1874, 1875, 1876, and 1877 we were suffering from a depression in values? A. Yes.

Q. And it did not begin to improve anywhere until 1882 or 1883? A. Well, it began to show an improvement in 1881.

Q. Is there much difference between the values on F between 9th and 10th streets and those on F between 6th and 7th streets? A. Yes.

Q. There is a most decided difference, is there? A. Yes.

Q. The highest value of any property between 6th and 7th streets on F would not exceed six dollars a foot now, would it? A. I think possibly it would bring a higher figure than that.

Q. How much higher? A. Well, perhaps eight dollars a foot.

Q. Then the value of property depends largely upon the particular location of it? A. Yes.

307 Q. And the surroundings of it? A. Yes.

Q. Do you think there is any fair comparison, for the purpose of ascertaining comparative values of property, to be made between this property at 9th and G streets and property midway between 9th and 10th streets on G?

WITNESS: From the present standpoint?

Mr. TOTTEN: Yes; any standpoint.

A. I should say yes. You have to take that whole locality in as a comparison to arrive at values. For instance, G Street property might — valued from values before placed on 9th Street property, and 9th Street property having been advancing all the time, as a business street, it would become more valuable. You have to take G street in comparison; you have to take 9th street as a business street and F street as a business street to fix your prices on G street.

Q. Would the prices on G street between 9th and 10th be any kind of a standard to be considered in ascertaining the value of this property on the corner of 9th and G streets? A. Yes, sir; I think they are reciprocal.

Q. Not to any very great extent? A. Yes, sir; because I consider G street an overflow of F street.

Q. When did you first go into real-estate business? A. In 1881.

Q. Where? A. No. 1416, it was then, F street northwest, the same spot where I am now; the Kellogg building.

JOHN A. PRESCOTT.

308 Subscribed and sworn to before me this eighth day of February, 1893.

ALBERT HARPER, *Examiner.*

CHESTER A. SNOW, being produced as a witness of lawful age for and on behalf of the defendants and being first duly sworn, deposes and says:

Direct examination.

By Mr. DAVIDGE:

Q. Please state your full name, age, occupation, and residence. A. Chester A. Snow; 49 years of age; patent solicitor, and I reside at No. 712 8th street northwest, in this city.

Q. Do you know the property at the corner of 9th and G streets northwest, formerly known as the Hitz property? A. Yes, sir; I do.

Q. When did you first become acquainted with it? A. I do not know accurately, but I think in 1884 or 1885. I took an office in that property in 1885 and 1886 and part of 1887, I think, during which time I rented the entire upper floor of the corner building.

Q. What property are you speaking of? A. I am speaking of the property at the northeast corner of 9th and G streets northwest.

Q. Were you present at the sale of that property in March, 1884? A. I was.

Q. Did you go to that sale to buy? A. I went there thinking that I would probably buy.

309 Q. Had you means to buy? A. I had.

Q. Why did you not buy? A. Because some one outbid me.

Q. How high did you bid? A. As well as I recollect, twenty-four thousand dollars.

Q. Was that sum your limit? A. It was not a limit fixed on before I went there, but I did not bid more.

Q. What did that property bring? A. As well as I recollect, about twenty-nine thousand dollars.

Q. State whether that was a fair price for the property. A. I do not know. It was more than I was willing to give. I would be glad to get it now for that; twice that; yes, three times that.

Q. That was more than the valuation you put upon the property at that time? A. It was more than I thought prudent to bid.

Q. How large was the company at that sale? A. I can only remember something about the appearance of the crowd there. I thought there was probably forty or fifty persons. I do not mean to say that there were many capitalists there, but there was the usual promiscuous crowd that gather on such occasions.

Q. About the usual crowd? A. I would think so.

Q. How many bids, to the best of your recollection, were there? A. I have no definite recollection as to the number of bidders. I think that I left there before the bidding had concluded. I think I did, though I may have stayed throughout.

310 Q. How many bids did you make? A. I think three or four.

Q. Were there counter-bids to those? A. Yes.

Q. Did you go to the sale alone or in company with anybody? A. I think I went alone, but met by arrangement a friend, or at least found him there—that is, we had both expected to go there, and I know he was there.

Q. Will you give his name? A. James H. Marr.

Q. What was his occupation? A. Real estate and insurance agent.

Q. Was he largely engaged in business? A. I think he was; I

do not know how large, but I think he had a considerable business.

Q. I understand that you expected to meet him there? A. Yes, sir; I did.

Q. For what purpose? A. We had talked about the property and thought of buying it together.

Q. Had he agreed to take part in the purchase? A. There was no definite agreement between us; there had been no plan, but we spoke of the property, of its being a desirable property, and that we would go there and see if we could buy it.

Q. Between yourselves, what limit did you put upon the value of the property? A. There was no prearranged limit that I recollect.

Q. When you stopped at twenty-four thousand dollars did he concur with you? A. He did; not in words, but by some
311 sign or some understanding.

Mr. TOTTEN: Objected to as hearsay.

Q. Did you talk it over with him at the sale? A. No, sir; I do not know that I had any conversation with him at the sale. I do not think I had.

Q. But he indicated in the manner you have mentioned his concurrence in your limit?

Mr. TOTTEN: Objected to.

A. By some sign or understanding with him I stopped bidding at that figure.

Mr. TOTTEN: Answer also objected to because hearsay.

Q. Did he leave the sale with you? A. I do not think he did.

Q. You think he remained? A. I think he did. I do not know. He may have left before me; but I do not remember coming from there with him. I remember that I was on horseback, and I do not think he was mounted.

Q. Did you afterwards purchase any property in the neighborhood of this property? A. I did, in the same square.

Q. Now, I wish you would state generally what property and at what time and the price you gave for it. A. I purchased the property that is now No. 712 8th street northwest, in the same square, then unimproved, for two dollars and fifty cents a foot, I think, in 1887.

Q. Did you purchase another piece of property in the
312 neighborhood? A. Yes; about the same time I purchased No. 710, the adjoining property on the south, improved, for six thousand five hundred dollars, just about the same time, I think, probably in the same week, which has a front of eighteen feet nine inches by a depth of ninety-six feet (96), I think.

Q. What was the character of the improvement upon that property? A. There was a three-story house, not in very good repair—quite old, in fact—which I use now as an office. It was not in very

good repair; it was in such repair that after adding six rooms to it by building a rear extension I used it for an office.

Q. And you are located there now? A. Yes; I might say that I also bought the house just south of it, I think No. 708, being three houses that I now own there; the last house I bought not more than two years ago, and I gave for it, I think, twelve thousand six hundred dollars.

Q. Can you give me some idea of the increase in values of property on G street since 1884? A. I have known very little about it except from general rumor and newspaper reports, but it has been very great, very great.

Q. Do you recollect when it began? A. No, sir; I do not.

Cross-examination.

By Mr. TOTTEN:

Q. When you went to this sale you went there after having an understanding with somebody about buying that property? A. Yes.

313 Q. Was it Mr. Marr? A. Yes.

Q. Well, now, for what purpose did you two gentlemen wish to buy that property—for speculation? A. I did not know Mr. Marr's purpose. The purpose I had continually in my mind was to get around in that locality that I might use for an office at some future time.

Q. Well, did you mean to buy all this ground in such great quantity there for an office? A. Well, I thought that if I did not have it for an office I could use it for something else. I used a good deal of office room. I occupy two entire buildings now.

Q. You say that there were forty or fifty persons there at the sale? A. Yes.

Q. Persons usually attracted by a sale? A. Yes.

Q. By the ringing of the bell, etc.? A. Yes.

Q. Were there the usual number of colored people, men and women and children, standing about there in the crowd? A. I suspect there were, though I carry very vaguely in my mind the appearance of the crowd. I suspect that there were some colored people, and there may have been some children, but I do not recollect of having seen any women.

Q. Do you know anybody besides yourself who made a bid? A. I think this gentleman (pointing to defendant Richard W. Tyler) was there at that sale, and I think Mr. Parker, the stationer on 7th street between F and G, was there. I think he was there, but I am not sure.

Q. The other gentleman to whom you referred a moment ago is Richard W. Tyler, one of the defendants in this case, who is

314 here present in the room? A. Yes.

Q. You say that you saw him there? A. I think he was there, or his partner.

Q. You mean by his partner Mr. Rutherford? A. Yes.

Q. Did either of those gentlemen bid? A. I am not sure. I think they probably did.

Q. Which one? A. I cannot tell you.

Q. Do you know of anybody else who did? A. No.

Q. Did Mr. Parker bid? A. I do not know; in fact, I do not know who bid against me.

Q. Do you really know that anybody bid against you? A. Well, I ought to; yes, I know that some one bid against me.

Q. How do you know it? A. Because the bids were raised.

Q. By the auctioneer?

Mr. DAVIDGE: Objected to. He has not said so.

Mr. TOTTEN: I am asking him whether the bids were raised by the auctioneer or by the other people in the crowd.

A. I cannot answer that.

Q. All you know about it is that the auctioneer raised the call on you? A. Yes.

Q. About how long a time were you present—ten minutes or half an hour? A. It would be impossible for me to remember, as I have thought very little of it since the occurrence. I would say over ten minutes, as well as I can recollect, and less than half
315 an hour.

Redirect examination.

By Mr. DAVIDGE:

Q. I understand you cannot say that Captain Tyler made any bid for this property? A. No; I cannot say so.

Q. Nor that Mr. Rutherford? A. No; I cannot say so.

Q. You recollect seeing Capt. Tyler there? A. I am not sure about that.

Q. And you are not sure about that? A. No.

Q. Do you recollect seeing Mr. Parker there? A. No, sir; I do not recollect seeing Mr. Parker there.

Q. But yet you have a vague impression that Mr. Parker was there? A. Yes. I know that Mr. Parker some time afterward thought I had bought the property, and this understanding on his part is the reason why I thought he was there.

Q. Now, as to the sort of people who made up the crowd, you had no particular motive for investigating the component elements of that body, had you? A. I was not thinking about the people.

Q. You were thinking about the property? A. Yes.

Q. Was it or not about the usual assembly that you have at sales of property of this description? A. I do not know much about sales of property. I think I have seen more and fewer people and about the same crowd.

CHESTER A. SNOW.

Subscribed and sworn to before me this 8th day of February, A. D. 1893.

ALBERT HARPER, *Examiner.*

316 JAMES H. McGILL, being produced as a witness of lawful age for and on behalf of the defendants and being first duly sworn, deposes and says:

Direct examination.

By Mr. DAVIDGE:

Q. State your full name, age, occupation, and residence. A. James H. McGill; forty-five years of age; I am a dealer in building supplies, and I reside at Le Droit Park, in this city.

Q. Do you recollect the sale, in March, 1884, of the property at the northeast corner of 9th and G streets northwest, formerly known as the Hitz property? A. I do, sir.

Q. You were not at that sale? A. No, sir; I was not present.

Q. You know that property? A. I do.

Q. It is about one hundred feet on G street and, I think, about eighty feet on 9th street, and contains, I believe, a little upwards of eight thousand square feet. You recollect hearing what the property brought? A. I do.

Q. What was it? A. About twenty-nine thousand dollars.

Q. Was that or not a fair price for that property at that time? A. I considered that a fair and reasonable price for it at that time.

Q. How long had you been acquainted with the property at the northeast corner of 9th and G streets northwest at the time
317 of the sale? A. I had known the property for about fifteen years at that time.

Q. What acquaintance had you with it? A. I have been in business around the Patent Office building, and I had an office in buildings around the Patent Office since 1865; and, having practiced as an architect before I went into my present business, I was familiar with business in that vicinity.

Q. If you had purchased that property in March, 1884, what value would you have attached to the buildings upon it, so far as they could be judged from the exterior? A. I would have placed very little value on the buildings except as a temporary means of bringing in a small return until the ground could have been properly improved.

Q. For what was that property mainly available? A. The first story to be used as sales-room—for mercantile purposes—and the upper story for offices.

Q. Is that the use you would have made of it, probably, if you had bought it?

WITNESS: Do you refer to the present buildings or buildings that would or might have been put up there?

Mr. DAVIDGE: Is that the use you probably would have made of the property if you had bought it? A. Yes.

Q. I understand you consider that the most available use? A. Yes.

Q. I think you bought, Mr. McGill, some property in that neighborhood, a year or two before this sale. Can you tell me what property you bought, from whom and when, and at what price?

A. I bought lots fifty-six, fifty-seven, and fifty-eight, in square
318 376, between F and G and 9th and 10th streets northwest. from the president and directors of Georgetown college. I made the purchase April 11, 1883, and paid one dollar and fifty cents per square foot.

Mr. DAVIDGE: From the Georgetown college?

Mr. TYLER: It is put down here on Ashford's abstract as Gonzaga college.

WITNESS: I may be mistaken about it. It was Georgetown or Gonzaga college.

Q. You gave for that property how much? A. As I have just stated, one dollar and fifty cents per square foot.

Q. What frontage was there? A. Nearly seventy feet, lacking only a few inches.

Q. You since improved the property, I think? A. I improved it twice. When I first bought it I put up a two-story building, and two years ago I tore it down and built an eight-story fire-proof building.

Q. For what purpose do you use that building? A. As an office building.

Q. Why did you erect so large and so high a building upon that property? A. That was the lowest building on which I could figure out that it would bring a rental equivalent to the cost of the building and six per cent. on the price that was asked for property in that vicinity.

Q. Now, when you made that purchase I would be glad to know whether the price was high, or what its character was—that is, the price you paid for that property, one dollar and fifty cents per square foot—what people generally thought of it. A. It was
319 considered a fair price. I had an opportunity to buy other lots along G street at that time for about the same price.

Q. I want to ascertain, as well as I can, about the prices along G street, on both sides, at that time. A. The National Rifles bought three lots immediately west of the lots which I bought; they paid one dollar and twenty-five cents per square foot, and I bought after they built. The piece of the property I built on was raised from one dollar and twenty-five to one dollar and fifty cents on account of the Rifles improving their property by a very nice building for their armory.

Q. Could you have bought other property in the neighborhood at that time, and at what price? A. I could have bought the property on the northwest corner of 10th and G streets northwest for two dollars per square foot.

Q. Improved? A. It was unimproved. It was a vacant lot with a brick fence around the corner of it. I hesitated for a week before closing the purchase I did make—that is, I hesitated whether I would buy the corner of 10th and G streets at two dollars a foot or the one I did buy at a dollar and fifty cents a foot.

Q. Do you know the prices ranging for property along the row of houses there, I think, on the north side of G street? Do you know whether you could have bought any of them? A. Opposite.

my building there were a number of houses that were offered in the market for several years, without takers or buyers, at about seven thousand or eight thousand dollars for the house and lot, each lot being improved by a four-story building.

320 Q. About what are those building- worth or were they worth at any time? A. It is difficult for me to say. I know what it cost to put them up there.

Q. What did it cost to put them up? A. About five or six thousand dollars each.

Q. And what, about, is the frontage of those lots—improved, as you say, by buildings? A. About twenty feet.

Q. Well, after that time there was a great change in values on that street, was there not? A. There was a slight improvement for a few years following; then, along about 1888 or 1889, there was a very sudden increase.

Q. A revolution? A. A very sudden increase in values—prices increased.

Q. And at that time how high did they mount up compared with the old prices? A. Five or six times the prices for which the ground sold along about in 1880, 1881, 1882, and 1883.

Q. If your property was vacant now, what would you be able to obtain for it per square foot, if you had held on to it without improving it? A. I never offered the ground for sale. I was offered one hundred thousand dollars for the ground before I improved it.

Q. Before you put the last building up? A. Yes, sir; and I declined to consider it.

Q. When did you put up that last building? A. It is just finished. I was building it during the last two years.

321 Cross-examination.

By Mr. TOTTEN:

Q. Did you make any observation of the row of houses opposite you when in process of construction? A. I saw them while being built—I passed there while they were being built.

Q. They were built by a firm of men for speculative purposes, were they not? A. I understand they were built to be sold again.

Q. They were not half built? A. No; I would not want to say that.

Q. They were built dishonestly in every way, were they not? A. I do not assent to that statement. They were defectively built in one very important particular, and that was in the manner that the builders took to secure a good foundation. I am familiar with those particular houses because I repaired them while I was practicing as an architect—that is, I had charge of the repairing of a number of those houses, one for Mr. John G. Kendall, one for Mr. Alfred Richards, and one for Mr. Van Riswick. I superintended the repairing of the foundations.

Q. Each of those three gentlemen you have named took one of those houses to pay for the money which they had loaned upon them? A. I do not know.

Q. Did not John Van Riswick put on nearly as much more money as was paid for the original construction of the building when he repaired the house? A. I do not know. The attention I gave was the supervision of the repairing and strengthening
322 of the foundations; the other repairing in patching the wood-work and plastering, etc., was done without my attention.

Q. That is, he took out all the mantels, for instance, and replaced them because they were worthless? A. I could not say whether he did or not.

Q. They were built along in 1872 and 1873, during the reign of the Board of Public Works? A. About that time.

Q. Were not every one of those houses sold for debt, for the money borrowed to build them with, and did not they stand idle for a long time? A. I believe so.

Q. They stood idle for a long time? A. Yes.

Q. And were subsequently sold to pay the debt upon them? A. That may be so. I do not know.

Mr. DAVIDGE: Do not answer anything you do not know.

WITNESS: It may be so, but I do not know for certain.

Q. You say that you could have bought property on the northwest corner of 10th and G streets northwest for two dollars a foot? A. Yes.

Q. From whom? A. I cannot give the party's name at the present time; but I remember having it offered to me by the agent who had the property for sale, and I had it under consideration.

323 Q. It was the house next to the vacant lot which was occupied as a sort of a home for Masons, was it not? A. Yes.

Q. The property on the corner, which you had under consideration, was a very narrow piece of ground. I mean it fronted on G street about eighteen or twenty feet only? A. My recollection is that there was considerably more frontage than that, and that it ran back to a ten-foot alley.

Q. The frontage on 10th street was more than it was on G street? A. My recollection is that it was considerably more.

Q. About how wide was it; how much front on G street? A. My recollection is, about thirty-five or forty feet.

Q. As wide as that? A. Yes.

Q. Did that include the whole building? A. No, sir; it included the portion inclosed by the brick wall.

Redirect examination.

By Mr. DAVIDGE:

Q. You have spoken of the foundations of these houses being defective. You may as well state in what respect. A. The builders put in sufficiently broad concrete foundations on the made earth to build the houses upon, and, in my opinion, to have safely carried them; but after the concrete was laid they spread timber on top of the concreting and then built the brick walls on top of that timber,

and in a very short time the timber rotted out and the wall settled down to the thickness of the timber.

Q. And it was your business as an architect to remedy the
324 defect in the foundations which you have described? A. I took out all the timber remaining and had brick-work inserted in the place to fill the space occupied by the wood-work which was removed.

Q. I understand that the whole defect was on account of these timbers? A. The cracking and settling of the building was caused by the walls settling where the wood decayed.

Q. And you removed the timbers? A. Yes, sir; and had the brick-work inserted.

Q. What did that cost, each house? A. I could not say closely.

Q. I understand that the foundations were originally broad enough? A. I think so.

Q. And that there never would have been any settling but for the rotting of this timber?

Mr. TOTTEN: Objected to.

A. Very little.

Q. And the defect you corrected by the removal of the timbers? A. I corrected it so far that the walls would not settle any farther.

Q. Well, now, Mr. McGill, was this before the time, as I understand, one of these houses was offered to you? A. I think it was before I bought on G street.

Q. You do not seem to comprehend me. What I want to get at is whether you repaired those houses before one of them was offered for sale to you. A. I do not think I said one was offered to me. I said that they were offered in open market at the price I have stated after these repairs had been made.

325 Q. I wish you would give me about the cost of correcting the defects you have pointed out. I do not expect you to give it exactly, but in a general way; how much it took to make the houses just what they ought to be in point of this defect. A. I could not give you a definite answer to that, because, as I have stated, only a part of the repairs on the building was under my supervision.

Q. I am speaking, however, of this particular defect. Cannot you tell me how much it cost? A. Probably three or four hundred dollars for each house.

Q. And beyond that defect you know nothing of your own knowledge? A. No, sir; I did not have charge of the other portion of the repair work.

Q. Now, with a view to illustrating the prices on G street, I would like to ask you what, in your opinion, the lot at the northwest corner of G and 10th streets northwest, which was offered to you at two dollars a foot in the fall of 1883 or thereabouts, would have brought, say, in the year 1890. A. I believe that the very corner which was offered to me was sold to Batchelder & McLachlen for fifteen dollars per square foot, but in the meantime it had been improved by a three-story building.

Q. What did they do with the building—pull it down? A. No, sir; it remains there. They remodelled and arranged it to suit their real-estate business.

Recross-examination.

By Mr. TOTTEN:

Q. Do you know of your own knowledge how much they
326 paid for that house? A. Only from seeing it in the newspapers.

Q. That is all you know about it? A. Yes, sir.

JAMES H. McGILL.

Subscribed and sworn to before me this 8th day of February, 1893.

ALBERT HARPER, *Examiner.*

(Adjourned to February 11, 1893, Saturday, 1 o'clock p. m.)

FEBRUARY 11, 1893—Saturday, 1 o'clock p. m.

Met pursuant to adjournment.

Appearances: Enoch Totten, Esq., solicitor for the complainant; Walter D. Davidge, Esq., solicitor for the defendants, one of whom, Richard W. Tyler, is present; also the examiner and—

CHARLES C. DUNCANSON, who was called for further cross-examination.

Mr. TOTTEN: The testimony of Mr. Duncanson was closed at the time he was last on the stand, and Mr. Davidge now calls the witness on his own behalf, not mine.

Mr. DAVIDGE: The record will show that the examination of the witness in chief was not closed.

CHARLES C. DUNCANSON, having been duly sworn as a wit-
327 ness of lawful age for and on behalf of the defendants, deposes and says:

Direct examination.

By Mr. DAVIDGE:

Q. I understood you to say in your examination-in-chief that you were present at the sale of the property at the northeast corner of 9th and G streets, in March, 1884. You did not say anything as to the fairness of that price. I wish you would now state whether that was a fair price for the property or not. A. As I understand the property, it fronted about 100 feet on G street and about 80 feet on 9th street, improvements consisting of the two-story buildings on 9th street and the two brick houses, with high steps, on G street. I believe that, at the price property was selling that year and placing the number of feet of ground at 8,000, it was about a fair price for it.

Q. You stated in your testimony-in-chief that you went to the

sale, and before going there was some conversation between you and O. C. Green, and that he was willing to go into the purchase of the property with you. I wish to know at what price you were thus to purchase the property. A. I think in my testimony I stated that Mr. Green left it principally upon me; in fact, that he would be satisfied with anything I did; if I made a purchase or if I did not make a purchase, he would not be dissatisfied. I do not think Mr. Green limited me to any specific price.

Q. What, in your own mind, was your estimate at that time of the value of this property? A. In talking it over together we concluded that anywhere from $20,000 to $24,000.

328 Q. Did you intend to buy and improve, or was your purpose to buy and make a turn? A. Our purpose was to buy and make a turn—speculate.

Q. Would you have given $29,000 for the property at that time? A. I do not think I would have done so for the purpose for which we wanted it.

Q. You are well acquainted with the improvements upon the property, are you not? A. Yes, sir; have been for years.

Q. In buying a piece of property of that sort, what value would you attach to the improvements? A. I should not attach great value to the improvements.

Q. Would they be worth anything except for the material on hand after pulling them down? A. I hardly think they would be worth the trouble of tearing them down.

Q. For what purpose was that property mainly available?

The WITNESS: At that time?

Mr. DAVIDGE: At that time.

A. They would have been very suitable for a large building for any purpose, with stores underneath, the same as the building put on the corner of 8th and G streets, the Bureau of Education, connected with the Interior Department.

Q. They purpose, then, would have been a building the ground floor of which could be occupied for stores and the upper part for offices? A. Office rooms.

329 Q. If you had sold that property at that time, how would you have sold it, in bulk, as it was sold, or otherwise? A. That depends a great deal upon the trustees' instructions.

Q. Suppose you had been the trustee and had discretion, how would you have sold it? A. I think I would have tried the 9th Street property separate, providing the depth of the same was about 60 feet, and providing also that with that depth of 60 feet that neither wall of the brick on the east would encroach upon it, if the trust gave me the power to sell in that manner. If the depth on 9th street was a shorter depth than that (as the depth running from 9th street along G, I mean), I should not have put it up separately on any consideration.

Q. In other words, you would have tried in the last contingency to make the corner carry the rest of the property? A. The short depth in the corner would not have been advantageous to the sale

of it, as would the longer depth of 60 feet, and even a little longer depth than that.

Q. You are, I believe, intimately acquainted with real-estate values in this city? A. I have some knowledge of them, I believe.

Q. Have you carefully watched the development of values on F street? A. Yes, sir; I have seen some very rapid and remarkable changes in property on F street.

Q. About what year was it when a decided change in values was perceptible on F street? A. I think that commenced about 1888.

330 Q. You are thinking of G street, I dare say. I mean F street. A. In 1887 along there F street did not change much. F street made a change from about 1877—was right low. About 1880 F street began to take a jump and went on jumping in 1888 and 1889.

Q. Can you state any fact in real-estate improvement that gave an impetus to values on F street? A. I think Mr. Moses was about the pioneer to go on F street.

Q. About what time did he build? A. I may be mistaken in a year or so. I think about 1883; along there.

Q. Did he precede or follow the Boston store, on the corner of 12th street? A. He preceded the Boston store.

Q. The Moses building is on the southwest corner of F and 11th streets? A. Yes, sir.

Q. Do you know what Moses gave? A. No; I do not. I have heard. I would not like to say.

Q. Do you know of any sale of F street about that time—1884-'5-'6? If so, state it. A. I sold a piece of property on F street next to the corner of 12th, on the south side.

Q. Next to the corner of 12th—that is, next to the southwest corner? A. The southwest corner, the old Middleton house. He lived there, and then there was the coal office of Kurtz Johnson—the one who came in this place of Keyser's.

331 Q. When did you make that sale and what did the property bring? A. I made that in the latter part of 1883, if I remember aright. There was a building on it used as a restaurant and a dwelling; I believe a three-story building. That sold for about $6.00 a foot; or, in other words, it was about 20 by 90.

Q. What would it bring now? A. I think the fellow got about $35.00 a foot for it.

By Mr. TOTTEN:

Q. In what year was that? A. 1883.

By Mr. DAVIDGE:

Q. Do you recollect the value of the church property between 9th and 10th on the north side of F street in 1881-'2—along there?

WITNESS: St. Matthew's Church property you speak of?

Mr. DAVIDGE: Yes; St. Matthew's Church property.

A. I have heard. I have no actual transactions in regard to any

of that property. I think the western portion of it was put out on a ground lease.

Q. I think it was; but the eastern? A. The eastern portion of it, if I remember aright—I happened to be connected with the insurance company known as the Washington Endowment—I heard the board of directors say it was offered to them at $2.00 a foot.

Q. What would that be worth now? A. There was a piece there—I think it was about 35 feet front and 110 feet deep—sold for $100,000 a short while ago.

Q. You have been speaking of the change in values on F street. I wish you would tell me about what time any change took
332 place on G street. A. I do not think there was any great change in values on G street until after 1887; virtually the big changes were about 1888–'9, running into 1890.

Q. Give us some idea of the extent of the change in 1888, 1889, and 1890. A. I purchased a piece of property on G street between 10th and 11th. It had a very large, fine brick building upon it, used by the Sisters. I think they had a day school there, and also a boarding school.

Q. What year was that? A. I think that was about 1885. I purchased it for $13,000. The purchase was not made for me, but on my advice, acting as agent for the purchaser. When the boom commenced there he was offered some thirty-odd dollars for the same property.

Q. What were the dimensions of that property? A. 30 by 120. It may have been 129. It runs in my head it was that.

Q. What was the value of the house? A. The house could not be placed there for the price which I paid for the whole property.

Q. I wish to get at, if I can, about the price of the land under the circumstances. Put a large valuation upon the house, and about how much would be left for the land? A. I paid probably about $2.00 a foot for the land, and the balance of it would be the value of the house.

Q. What would the property have brought in 1890—the latter part of 1890, say? A. It would have brought, if put up, about $30,000. In 1890 there were some little improvements made upon it.

Q. The old house had been improved, I understand? A. Yes, sir.

333 Q. Well, throw them out. A. It would probably have brought from $30,000 to $35,000.

Q. Have you personal knowledge of any other sales in that locality within the range of a few squares from the corner of 9th and G streets, either way? A. I have heard of sales—never had anything to do with them—on the south side of G street between 9th and 10th.

Q. You had no personal knowledge of them? A. No, sir.

Q. Have you any personal knowledge of sales on G street within two or three squares east or west? A. I sold a house on G street, on the north side, one of the Stevens row, about 1883.

Q. At what figure? A. $5,800. I sold a property in 1885 on G

street between 9th and 10th. It contained about 2,500 feet of ground, 24 feet front. It was improved by a large twelve-room brick, I believe. That I sold for $12,200. I understand your question to confine me to G street?

Q. Yes. Give me the dimensions of the lot. A. If my memory serves me aright, it is 20 by 90.

Q. That would be 1,800 square feet? A. Yes, sir.

Q. What was the character and value of the improvement? A. The improvements when the houses were built cost considerably more than was gotten for the house and lot.

Q. But what would — estimate the value of the improvement to be at the time of the sale? A. About $3,000.

334 Q. So that, according to your estimate, that lot was worth $2,800? A. I say about that.

Q. We will now go to the other sale, on G street between 9th and 10th streets, the 24-foot lot, improved by the twelve-room brick. I do not know that you have said what you got for that property. A. $12,200.

Q. What was the value of that house? A. Very good house.

Q. How much of the purchase-money would you attribute or apply to the ground? A. About $4,600.

Q. What was the depth of that lot? A. 103, I think.

Q. Have you personal knowledge of any other sale on G street in 1883, '4, or '5, along there? A. No, sir.

Q. Can you recollect any other sales on 9th street, in that neighborhood, or on H street, during the years 1883, '4, '5? A. In 1883 I sold property on H street.

Q. How far from 9th street? A. Between 9th and 10th—about 100 feet west of 9th street.

Q. At what price? A. 92½ cents and $1 per square foot.

Q. How much property did you sell? A. There was a front there of 80 with a depth of 123 feet.

Q. Well, any other? A. I sold a house and lot on H

335 street between 9th and 10th streets in 1885.

Q. For how much? A. The lot was 20 by 123. I sold for $8,025.

Q. What was the value of the house? A. It cost about two years prior to that to build it $7,800.

Q. What did you get for that? A. $8,025.

By Mr. TOTTEN:

Q. Do you know that? A. Yes; I happened to be the fellow to pay the money out.

By Mr. DAVIDGE:

Q. What did you say the purchase-money was? A. $8,025.

Q. When was that sale made? A. That was made in 1885.

Q. Have you personal knowledge of any other sale in the neighborhood? A. I sold a lot on I street near the corner of 8th—between 8th and 9th.

Q. What were the dimensions? A. 32½ by 70, I think it was.

Q. Improved? A. By a small frame house.

Q. What did you get? A. $2,375.

Q. What year was that? A. That was 1886, if I remember correctly.

Q. A house of no value, I suppose? A. Well, you could not consider it of any value; still it was like some houses, the
336 rental would pay your taxes and a little to put in your pocket.

Q. Did you ever sell any property east of 9th on G street? A. I have between 4th and 5th.

Cross-examination.

By Mr. TOTTEN:

Q. You say that you had it in your mind to pay from $24,000 to $25,000 for this property at the time of the sale, and that it was for speculative purposes solely. Is that correct? A. Yes, sir.

Q. Would you have paid that for that property during the pendency of a lawsuit in relation to the title to the property, or was that idea of yours based on a clear title? A. Based on a clear title. I would not purchase a piece of property knowing that I had to defend a lawsuit.

Q. Would you purchase a piece of property and pay for it as much as $25,000 with an undecided lawsuit pending against it involving the title to it? Would you purchase any property encumbered in that way? A. I would not purchase a piece of property unless I had a thorough knowledge in regard to that lawsuit, where there was no chance of its being dismissed. I mean to say that in purchasing a piece of property I generally take it to the examiner to find out whether I shall take it or not.

Q. Suppose the examiner report a pending lawsuit involving the validity of your vendor's title, would you take it then under any circumstances? A. I would not take it subject to pending
337 lawsuit.

Q. Then, if you had known that this property was involved in litigation as to the title, would you have paid $24,000 or $25,000 for it? A. I should not have wanted to purchase it at all.

Q. What would that property have been worth, in your judgment, not for speculative purposes, but for purposes of investment—for the purpose of being improved according to a man's taste and judgment and being retained by him? Would it have been worth more than your speculative price? A. It would have been worth more than my speculative price, because I went there for the purpose of making something on my purchase.

Q. You wanted to make a handsome sum? A. That is what we desire to do.

Q. If a man wanted that property for the purpose of investment—to keep as his own property—how much would it have been worth at the time of that sale? A. It would depend upon the use that he made of it.

Q. Put to the very best use that you can think of, what would it have been worth at a fair valuation? A. I cannot say anything more than what it is worth in the market, because some men can take a piece of property and it is worth a great deal more to them in their own minds than it is to the general run of persons; but, as I stated in the beginning, the price named, $29,200, was about a fair price for it.

Q. Would you have advised a customer of yours to invest that much money in that property at that time pending this lawsuit? A. As I have said before, if they were buying the property and shouldering the lawsuit I should not advise them to buy
338 at all.

Q. Stevens' row, about which you have been talking, is situated midway between 9th and 10th streets on the north side of G street? A. Little nearer 9th street.

Q. How many houses are in that row? A. I think nine.

Q. They are three-story houses? A. Yes, sir.

Q. Did you sell the property in pursuance of a deed of trust to pay creditor's debt? A. I sold under a deed of trust; yes.

Q. You were the auctioneer, trustee, or what? A. The auctioneer.

Q. Who was trustee? A. I really forget now.

Q. All those houses were encumbered, were they not? A. Yes, sir.

Q. By whom were they built? A. I cannot say positively.

Q. What was the reputation those houses had at the time you made the sale with regard to being well or indifferently built? A. They were not the best-constructed houses; their reputation was not the best.

Q. They stood for a long time entirely unoccupied? A. For a long time during the continuance of the building they were not rushed through. I think there was some trouble in regard to raising funds to pay for them.

Q. They stood with the roof on unfinished for a year and a half? A. I cannot tell the length of time—only an unusual length
339 of time for a house to stand.

Q. Who was the purchaser of the house you sold? A. I think it was a Mrs. Miller, whose husband was connected with the Critic.

Q. Do you know whether they were all sold under deeds of trust to pay the debts, mortgages—that whole row, one after the other? A. I think they were.

Q. Do you know whether the purchasers did or did not ——

Mr. DAVIDGE: Confine yourself to your personal knowledge. Have you personal knowledge of this?

WITNESS: The sale of all of them, understand, occurred some time prior to the time at which I sold this one. I was not the auctioneer in the sale of all of them. I think they were all sold as you stated—probably one after the other under the trust, and that was shortly after having been built.

By Mr. TOTTEN:

Q. What do you know as to whether or not the purchasers of those houses under these trust-deed sales were compelled to expend large sums of money on the houses to render them habitable? How was it as to Mrs. Miller who purchased from you? A. Mrs. Miller purchased the house some time after they were finished.

Q. What do you mean by some time—a year or so? A. Oh, yes; more than that—two or three years or more.

Q. That house that you sold to Mrs. Miller was sold to her for $5,800? A. That is my recollection of it.

340 Q. And you say that the house cost nearly as much as that to build it, did you? A. When I say cost nearly as much as that, I mean to say that it would cost as much. How much it actually cost I could not say.

Q. You sold a house for $12,200 on G street. Was that one of this row? A. No; that is the other side, just east of the Congregational church.

Q. Where is the Stevens row? A. The Stevens row is east of that, but west of 9th street.

Q. You do not mean to say that there are two rows? A. Yes, sir; one sits back on the terrace.

By Mr. DAVIDGE:

Q. Is that Stevens' row? A. No, sir.

By Mr. TOTTEN:

Q. The other row begins with the church and ends with the Stevens row? A. No, sir; there is a vacant lot between Harrover's house and the other row.

Q. Was this $12,200 house nearest to the church? A. Yes, sir.

Q. The one adjoining the church? A. Not the one adjoining, but, I think, the second one this way. I say this way, because I keep thinking of my office. It is east—east of the church.

Q. When did you make that sale? A. This was in 1885, I think.

Q. When did you make the sale for $5,800 to Mrs. Miller?

341 A. That was about 1883—somewhere along there.

Q. What is the difference between the price of real estate on H street between 9th and 10th streets at this time and what it was in 1881? There has been no particular advance in the property on H street, has there? A. Oh, yes.

Q. How much? A. I doubt whether you could go there and touch any one for less than $5 or $6 a foot. Some hold at $8 and $10.

Q. When did that rise in property begin? A. Right after the rise on G street—right after the commencement of the rise on G street.

Q. Jay Cooke & Co. failed the 18th of September, 1873. Am I right in my date? A. I think so.

Q. That was about the beginning of the financial depression in

this city and District, was it not? A. Prior to that time property had been booming right along.

Q. And it dropped dead then? A. In 1874 it dropped.

Q. Pretty nearly dead? A. It was something unusual to sell to what we call outside parties.

Q. Between 1874 and 1880 there was no such thing as making a sale to an ordinary purchaser in pursuance of the terms of the deed of trust, was there? The creditor himself had always to buy, had he not?

Mr. DAVIDGE: That is objected to as leading.

WITNESS: From 1874 to about 1878 it was a rarity to sell
342 a piece of property at auction under trust to any other than the party holding the note.

Q. Can you say property began to rise in 1878? A. In 1878 it got a little better, and gradually continued on until 1880, 1881, and about 1883, along there—began to get better—more perceptible.

Q. Did that change in the disposition of people to buy property extend to property all over the city? A. More particularly to property west of 7th street.

Q. Did not begin on property east of 7th street quite so soon? A. Not much east of it, no.

Q. Can you tell us what particular sales you regard as evidence of the beginning of the advance in property on F street between 9th and 15th streets? A. There was a piece of property, which I have just mentioned, sold to Mr. Thorn in 1883.

Q. Where was that located? A. On F street near the corner of 12th, within about fifty feet of 12th street.

Q. That is one of the sales you have mentioned? A. That is one I have mentioned.

Q. When was the Masonic temple built, corner of 9th and F streets? A. I really could not at the present time tell you the year.

Q. When did Waggaman buy or lease the property extending from the Masonic temple or anywhere there up toward 10th
343 street, if you know? A. As I stated in my examination today, I think it was the west portion of this St. Matthews Church property that was put out at leasehold. There were, probably, about 100 feet or more adjoining the Masonic temple made absolute sale of belonging to Gonzaga college, I believe.

Q. What I want to know is when those sales were made. A. I cannot tell the exact date the Beneficial Endowment Association put up its building—along in 1878, or it may have been later; I do not remember.

Q. You spoke about a sale which you made on I street near the corner of 8th street, in 1885. What was the improvement on that property? A. Two-story frame.

Q. How far was it below I? A. It was on I between 8th and 9th streets.

Q. What is your best idea now as to the date when Waggaman made this purchase of the St. Matthews Church property? A. I thought he made his purchase before.

Q. Did the endowment association itself buy? A. Yes, sir; they bought and put up a building.

Q. That was not included in Waggaman's purchase? A. I do not think it was.

Q. Waggaman's purchase was made in 1881? A. I think so.

Q. What kind of locality is it on I street where you made this sale? A. Residence.

Q. What is it occupied for? A. Residence, principally.

Q. Meat market, &c. At that time a good many of the houses were wooden houses with two stories, gable roofs, were they
344 not? A. Still are; there is not much change there.

Q. That has been at a standstill? A. On the north side of the street most of the parties own the houses.

Q. How long have you been acquainted with Captain Tyler, the defendant? A. I might say off-hand about twenty years.

Q. He was a member of the firm of Tyler and Rutherford? A. Yes.

Q. And is yet? A. Yes. It may not have been twenty years and it may have been.

Q. What is his business? A. I have known him as an insurance agent and loaner of moneys on real estate.

CHAS. C. DUNCANSON.

Subscribed and sworn to before me this 11th day of February, 1893.

ALBERT HARPER, *Examiner.*

Adjourned to meet on Monday, the 13th inst., at 3.30 o'clock p. m.

Adjourned to—

FEBRUARY 13, 1893—Monday, 3 o'clock p. m.

Further adjourned to—

FEBRUARY 15, 1893—Wednesday, 3 o'clock p. m.

Further adjourned to—

FEBRUARY 18, 1893—Saturday, 1 o'clock p. m.

Further adjourned to—

345 FEBRUARY 20, 1893—Monday, 3 o'clock p. m.

Met pursuant to adjournment.

Owing to absence of witnesses, further adjourned to February 25, 1893, Saturday, 1 o'clock p. m.

ALBERT HARPER, *Examiner.*

FEBRUARY 25, 1893—Saturday, 1 o'clock p. m.

Met pursuant to adjournment.

Appearances: Enoch Totten, Esq., solicitor for the complainant; Walter D. Davidge, Esq., and Morgan H. Beach, Esq., solicitors for the defendants, one of whom, Richard W. Tyler, is present; also the examiner and—

O. C. GREEN, who, being produced as a witness of lawful age for and on behalf of the defendants and being first duly sworn, deposes and says:

Direct examination.

By Mr. DAVIDGE:

Q. State your age, residence, and occupation. A. I am fifty-four years old, and have been for over twenty years in the real-estate business here in this city.

Q. Do you recollect what was known as the Hitz property at the northeast corner of Ninth and G streets in March, 1884? A. About that time, I do not recollect the exact date—somewhere in the spring of 1884.

Q. Had you any idea of making a purchase of that property, alone or with anybody else; and, if so, with whom? A. We
346 knew the property was going to be sold, and Mr. Duncanson and I had a talk over the property and we thought we would buy it together if we could get it right. We talked the matter over once or twice, but we did not buy.

Q. In your conversation with Mr. Duncanson, what was the largest amount which you two were willing to give for the property? A. Amongst ourselves we fixed it that we would not go over $25,000.

Q. I believe Mr. Duncanson went to the sale? A. Yes, sir; I believe he was there. I did not go.

Mr. TOTTEN: You do not know anything about that; do not state that.

WITNESS: We would have been interested.

By Mr. DAVIDGE:

Q. At that time you were acquainted with values in that locality, were you not? A. I had been then in the real-estate business for twelve years; I had been making loans and selling property all round and through the city. I think I was pretty well posted.

Q. This property contains a little over 8,000 square feet, 100 feet on G street and 80 feet on Ninth street, the east 30 or 40 feet of the property running back a little more than that on Ninth street, the whole dimensions being upward of 8,000 square feet. What, in your opinion, was a fair price for the property at that time? A. We thought if we could buy it for $3.00 a square foot we would buy it—about $24,000 or $25,000.

Q. It brought upward of $3.50 a square foot? A. Yes, sir.

Q. Was that, in your judgment, a fair price for the prop-
347 erty? A. I consider it a fair price for the property at that time.

Q. Can you tell me about the time of the manifest rise of property on F street? A. It is very hard to tell the exact time; it was, in my opinion, along about 1887 that the palpable rise took place—1887 or 1886.

Q. I do not speak of G street; I speak of F street. A. I do not

know. I should not think the rise took place very much before 1887 or 1888.

Q. I ask you when the rise first became apparent to anybody on F street. A. I cannot give the date; a short time after Moses built up there on the corner of Eleventh and F streets. What time that was I do not know. That seemed to start it.

Q. I understand the rise on G street took place in 1886 or 1887? A. Along about that time—1887.

Q. Had you occasion to offer any property for sale on G street in the neighborhood of the Hitz property; and, if so, at what time? A. I put a trust on a house east of this house, on G street between Seventh and Eighth streets, on the north side of the street—there is no south side there. I think the house is No. 709; it is a four-story brick with an attic to it; it runs back to an alley. I put a trust on it, and the man could not pay. I advertised it a couple of times. It was about that time. I do not know the year; I think it was 1883. I believe it was 1883; possibly it was 1882. We put this property up once or twice to sell it. I was one of the trustees on a loan that was made on it. We could not get a bid the
348 first time. My recollection is that it was three times. Anyhow, I will only state twice. When we put it up we could not get a *bona fide* bid over $9,000, and to satisfy the trust we should have had $10,000 or $11,000, and the beneficiary bought it in.

Q. The deed on it was $11,000? A. The deed was $10,000 and interest; along there—that is, in the square east of this square.

Q. Tell us now about the value of the house on that property. A. It was a very fine house.

Q. In computing the value of the property, at what would you set down that house? It was a four-story house? A. It was a four-story brick house.

Q. In computing the value of that property, at what value would you compute the house? A. I do not know how old the house was. I do not know when the house was built. There were three built in connection—three houses. The house certainly would *be* be built today for less than $7,000, I should think. I do not see how it possibly could be.

Q. I do not recollect what year it was you mentioned—1882, '3, or '4. A. I am not positive about the time. That was the nearest piece of property that I sold in that neighborhood or had anything to do with in that neighborhood. It was about that time. I do not think it was more than a year previously to this sale.

Q. You know the improvements on this property on the corner of Ninth and G streets? A. Yes, sir.

Q. In fixing the value of that property, what price would
349 you count them? A. My idea was to put the thing in a lump—the house and the land. I did not consider the house of very great value—two-story house. I do not know.

Cross-examination.

By Mr. TOTTEN:

Q. How familiar are you with those houses? A. Nothing more than looking at them from the outside—going around.

Q. Once or twice a year? A. It was often. When my attention was attracted to them I went up and looked around the property; did not go into them. They were occupied at that time.

Q. What would you say about the value of property that would produce $215.00 a month rent? A. You cannot tell from that. You can get shanties to rent for $10.00 or $15.00 a month; but the rental does not show the value of the property.

Q. If you should buy that property for a rise in its value, the improvement on it would be a matter of consideration? A. As a matter of course.

Q. Particularly if it brought $215.00 per month rent—— A. As a matter of course, if I bought——

Q. The matter of those improvements depends entirely upon the purpose for which you want the property? A. Yes, sir.

Q. If you want to buy the property to hold it, *for* the improvements are of value; if you want to buy it to improve it, they are of no account; is that true? A. The rental value would come in to pay taxes and some little interest on the money. That is
350 the way people look at those things.

Q. The $215.00 a month rent on that property is quite an item? A. Of course, I do not know what it rented for.

Q. You and Mr. Duncanson did not want to buy that property for the purpose of holding it for a rise in value; you wanted to sell it? A. We wanted to get the property to make something out of it.

Q. You did not want to hold it long? A. That would depend on whether the times were like they are now.

Q. Your purpose was to sell it immediately; you did not want to improve it, did you? A. No, sir.

Q. You wanted to sell it to make something out of it? A. Yes, sir.

Q. I suppose you and Mr. Duncanson had $24,000 or $25,000 to make the payment? A. We could have made the first payment.

Q. You were to take your chances of selling it again? A. We could have bought the property and made the cash payment; if they wanted all cash we could have borrowed the money.

Q. This property between Seventh and Eighth streets, which you told about having offered for sale, was in 1882? A. I think that was the year. I am not positive about the year.

Q. Do you think it was earlier than 1882? A. I do not think it was.

Q. Do you think it was later? A. I think not.

351 Q. You offered it how often—at least twice? A. At least twice.

Q. There were no bidders? A. There were no bidders that came nearer the amount necessary to satisfy the trust than $9,000. My recollection is it was in the neighborhood of $9,000.

Q. Did you offer the property for sale all cash or on terms? A. One-third cash and all the balance on time, my recollection is.

Q. What are the usual terms of sale of property in the District, and what were they at that time, 1884? A. I think that the usual way of selling was one-third cash and balance on time, although frequently property was sold all cash, especially where there was a trust on it.

Q. The property you tried was regulated by the terms of the trust itself? A. Yes, sir.

Q. And that was one-third cash and the balance in one, two, and three years? A. I think so.

Q. That was the usual way of selling property in this District at that time? A. I think that was the way property was sold.

Q. You have acted as trustee in a good many cases of this character, have you not? A. Yes, sir; a great many cases.

Q. Where a property is worth $25,000 or $30,000 would you offer it for sale and fix the terms under the trust as all cash? A.
352 I do not think I would unless there were some provisions in the trust.

Q. Suppose it was left to your discretion as trustee to be fair to all parties, how about the cash? A. I do not think I would do that.

Q. Why not? A. Because it is a good deal of money to pay down cash.

Q. In 1884 were there very many men in Washington who could command $25,000 in two days? A. Oh, yes; it would not be two days. It requires thirty days to get it fixed up; at least ten days.

Q. How many men could buy property for $25,000, all cash? A. A hundred of them.

Q. Then the purchasers of such a piece of property would be limited to a number of men who could do that, would they not? A. When I say a hundred I mean to say there are hundreds of them in Washington who could give their checks for $25,000.

Q. Now? A. Yes, sir; and in 1884.

Q. Were there in 1884 hundreds of men who could do that? A. Yes, sir.

Q. Still you say it was usual to offer property for sale all cash?

Mr. DAVIDGE: That is objected to. The witness says it is not as usual as the other way.

By Mr. TOTTEN:

Q. Do you know that property was offered for sale terms
353 all cash where the property was worth $25,000 or $30,000? You have not offered property for sale that way? A. I have in one or two cases. I have advertised where the cash was quite a large sum, pretty nearly what the property would bring. They were not very large sales.

Q. What was the highest value of either of those pieces of property? A. My recollection is now that the property I put up for cash was $3,000.

Q. That is the only case in your experience? A. My experience has been limited in that.

Q. The distance between Seventh and Eighth streets on G, opposite the Patent Office, is very short compared with the depth of the other squares? A. Both of those squares are very narrow—between Seventh and Eighth and Eighth and Ninth.

Q. Is the house on G street which you offered for sale so often the house that Mike Thompson had some claim on? A. No, sir; the next one was the one; Sam. Pugh owned —. Thompson's was the next; mine was the middle house.

Q. How do they stand with reference to the square—about the middle? A. Just about the middle.

Q. How many stories high are they? A. Four stories.

Q. Old or new buildings? A. I do not know when it was built. It was occupied at that time. I should not judge from its appearance that it was a very old building. The houses stand there now.

Q. Double houses? A. Twenty by a hundred.

354 Q. Does property on the north side of G street between Seventh and Eighth streets furnish a fair standard of value for property on the corner of Ninth and G streets? A. I will state now that the property nearer to Seventh street was worth more than than nearer *the* Ninth.

Q. At that place? A. I do not mean that that place was worth more than property on the corner of Ninth and G streets, but it was worth more nearer to Seventh than to Ninth.

Q. How would the property on Eighth and G compare with the property on the corner of Ninth and G at that time? A. Ninth and G would be a better property.

Q. This property is very centrally and handsomely located, is it not? A. Yes, sir; centrally located.

Q. You get a perfect sunshine on G street all day long? A. Yes, sir.

Q. And you get a good deal of sunshine on the Ninth Street side of this property? A. Yes, sir; but the sunshine does not count for much. The west side is much more valuable. On Ninth and Seventh, both, the west side is most valuable.

Q. Is it not a fact that property on Eighth street from G up toward New York avenue is not very desirable property? A. No, sir; it is not very desirable, because it is cut through in both places—cut through by the square at New York avenue and the Patent Office at G street. This property was not on Eighth street.

Q. It was on G street? A. Yes, sir.

O. C. GREEN.

355 Sworn to and subscribed before me this 25th day of February, 1893.

ALBERT HARPER, *Examiner.*

EDWARD J. STELLWAGEN, being produced as a witness of lawful age for and on behalf of the defendants and being first duly sworn, deposes and says:

By Mr. DAVIDGE:

Q. State your age, residence, and occupation. A. Thirty-eight years old; residence, Washington, D. C.; occupation, real-estate broker.

Q. How long have you been engaged in the business of real-estate broker? A. Since about 1877.

Q. Were you alone when you began business or in copartnership; and, if so, with whom? A. I was alone when I started, and in 1878 formed a copartnership with Thomas J. Fisher, under the firm name of Thomas J. Fisher & Co.

Q. That was in 1878? A. November, 1878.

Q. Where have you carried on the business; where has your office been? A. First on F street between Twelfth and Thirteenth streets, and then on F street between Thirteenth and Fourteenth streets—that is, during the existence of the firm of Thomas J. Fisher & Co. When I was in business for myself my office was on Seventh street between E and F streets.

Q. And after you went into partnership with Mr. Fisher
356 where was your place of business? A. On F street between Twelfth and Thirteenth, and afterward at our present location, between Thirteenth and Fourteenth, on F.

Q. Mr. Fisher, I think, also carried on the business of an auctioneer? A. That was one of the branches of the business of the firm.

Q. Was the business large in that way—as auctioneers? A. Not specially so; fairly good business in that line.

Q. When did Mr. Fisher die? A. The 26th of October, 1888, I think it was; either 1888 or 1889, but I think it was 1888.

Q. From the time you entered into copartnership with Mr. Fisher were you well acquainted with real-estate values on F and G streets? A. I was.

Q. Were you born in the city of Washington? A. I was.

Q. We are here investigating the value of what is known as the Hitz property, at the northeast corner of Ninth and G streets, having a frontage of 80 feet and the east end of 30 or 40 feet running back a few feet more than the residue of the property on Ninth street. Are you acquainted with that property? A. I am.

Q. How long have you known it? A. I have known it pretty much all my lifetime; went to school in that building when I was a boy at one time.

Q. This property brought at a sale on the 26th of March, 1884, a little upward of $3.50 a foot. I wish you would state your
357 opinion as to the value of the property at that time. A. I think it was a full value for it at that time.

Q. You were not at the sale, I believe? A. No, sir; I was not.

Q. I wish you would state instances of actual sales of property in the neighborhood, say, in the years 1882, 1883, 1884—along there.

A. These are sales that were made by our firm that I have personal knowledge of, not sales that I have heard of. On the 30th of January, 1882, we sold for Gonzaga college to Mary A. Coyle sublots 49 and 50, in square 376, for $15,000. The lots contain 5,116 square feet, and the rate paid was something short of $3.00 a square foot.

Q. That property fronts on F street and is about how far from the corner of Ninth and F streets? A. I should say about 100 feet west of Ninth street; just adjoining the Masonic temple on the west.

Q. ——? —. On the 9th of February, 1882, we sold for Gonzaga college to Mary A. Cushing and Elizabeth Varney sublot 64, in square 376, containing 2,558 square feet, for $7,675.50, which was about $3.00 a square foot. The total amount of sale was $1.50 more than $3.00 a square foot. The purchase-money was $7,675.50. At $3.00 per square foot it would be $7,674; so that it was $1.50 more than it would have been at $3.00 a foot—practically $3.00 a square foot. On the 4th of November, 1882, we sold for Gonzaga college to the National Rifles sublots 53, 54, and 55, square 376, which lots front on G street, and the price paid was $1.25 per square foot. On the 11th of April, 1883, we sold for Gonzaga college to James McGill sublots 56, 57, and 58, in square 376, for $1.50 a square foot. On the 25th day of March, 1884, we sold a piece of property on G street between 14th and 15th, on the north side, for George T.
358 Dearing to Louis Spainer, lot 11, square 223, for $15,000. This had a three-story brick building on it, and the price paid was about $6.00 a square foot. On the 15th of April, 1885, we sold for the Simms heirs to A. S. Able, of the Baltimore Sun, the east 28 feet of lot 4 by the full depth of the lot, in square 253, being a portion of the land now covered by the Sun building. We sold that for $20,500. I have not calculated that to see how much that is a square foot. I neglected to do so. It is 28 feet by 113 feet 10½ inches deep. I see that I have calculated it here. I have a memorandum. It is about $6.50 a square foot. There may be other sales that I have made that I have not taken from our record.

Q. Did you individually, or did the firm, purchase a piece of property on the north side of F street adjoining the Sun building? A. The present firm of Thomas J. Fisher & Co., which consists of myself and Thomas M. Gale, purchased about three years ago—that would be about 1890—the property adjoining the Sun building on the east, known as the Ridgway property, and paid $23.50 a square foot or thereabouts; it may have been a few cents one way or the other.

Q. Can you tell me about the time when the rise in values on F street took place? A. The activity in F Street real estate came about the time of the Sun Building purchase—from 1885 to 1886. I think it reached its highest point in 1890. I do not think it is worth any more today than it was in 1890.

Q. You recollect the building of the Moses store? A. Perfectly well.

Q. Did that help to raise values? A. It did.

359 Q. And was that followed by the erection of the Boston store at the corner of 11th and F streets? A. It was.

Q. When did any pronounced change in values on G street take place? A. I should say about 1888, being the result, in my judgment, of the overflow from F street.

Q. When it set in, was it rapid or otherwise? A. The market was active on G street when it started.

Q. You have mentioned two pieces of property on G street, the National Rifles purchase and the McGill purchase, a little west, as I understand, of Ninth street? A. The adjoining properties.

Q. What are those properties selling for now a square foot? A. Exclusive of the buildings, anywhere from $10.00 to $12.00 a square foot.

Q. You have spoken also of sales to Mary A. Cushing and others of property on F street west of Ninth and you have named the prices. What would that property sell for now per square foot irrespective of the improvements? A. From $18.00 to $20.00.

Q. And the Sun building? A. I do not think the Sun building would be worth any more than was paid by my firm for the adjoining land. I do not think it would bring any more today than we paid in 1890.

Q. Your estimates are conservative estimates, are they not? A. Yes, sir.

360 Q. Were you the agents for Gonzaga college? A. We were.

Q. About how long was the frontage on F street that belonged to that institute? A. Without consulting the map I could not tell. I would think, in an off-hand way, that they had 150 feet, probably, on F street.

Q. To where did that property run back? A. It ran clear through to G street, with a greater frontage on G street than on F street.

Q. And you were the agents for that property? A. Yes.

Q. Of course, in running through, it ran behind the lots on Ninth street? A. It did.

Q. In making a purchase of this property on the corner of Ninth and G streets, at what price would you estimate the improvements, making a large purchase of that sort? A. I would not estimate them at any value at this time, at prices that property is bringing.

Q. At the price in 1884? A. At a very small valuation.

Cross-examination.

By Mr. TOTTEN:

Q. What do you mean by a small valuation? A. A small valuation means in one case one thing and in another case another. I would have thought that the buildings were of little value; probably worth a couple of thousand dollars.

EDWARD J. STELLWAGEN.

Sworn and subscribed to before me this 25th day of February, 1893.

ALBERT HARPER, *Examiner.*

361 Adjourned to—

FEBRUARY 27, 1893—Monday, 2 o'clock p. m.

Met pursuant to adjournment.

Appearances: Enoch Totten, Esq., solicitor for the complainants; Walter D. Davidge, Esq., and Morgan H. Beach, Esq., solicitors for the defendants; also the examiner and—

EDWIN C. CUTTER, who, being produced as a witness of lawful age for and on behalf of the defendants and being first duly sworn, deposes and says:

Direct examination.

By Mr. DAVIDGE:

Q. State your age, residence, and occupation. A. Forty-eight years old; my residence is 1522 K street; occupation, real-estate agent.

Q. How long have you carried on that business in the city of Washington? A. I commenced here first in January, 1872. I was in the business until about 1880 and resumed it again in 1885.

Q. What time in 1885? A. I think in September or October.

Q. Were you in 1885 acquainted with real-estate values on F and G streets, in the neighborhood of Ninth street northwest? A. To a certain extent. While I have been out of the business for a few years prior to 1885, I have been here perhaps from a third to a half of the time; have been interested in loaning money, and have been in some real-estate transactions.

362 Q. We are investigating here the values of a piece of property at the northeast corner of Ninth and G streets, fronting 100 feet on G street and 80 feet on Ninth, and the east 30 or 40 feet running back a depth somewhat greater than the depth on Ninth street, containing in all upward of 8,000 square feet. Do you know that property? A. I recall it from your description.

Q. It was formerly known as the Hitz property? A. Yes, sir.

Q. There was a public sale of that property on the 26th of March, 1884, and it sold at that public sale for somewhat upward of $3.50 a square foot. I wish you would state whether that was a fair price or not. I ought to say that the sale was for cash and the property was sold in bulk.

WITNESS: You mean at that time?

Mr. DAVIDGE: At that time.

WITNESS: May I ask about what was the aggregate amount of the sale—the aggregate amount of the property?

Mr. DAVIDGE: It sold for $29,200—$3.50 and upward a square foot.

A. It would seem to me that that was a reasonable price at that time for the property.

Q. Can you recollect how long after that it was that the rise of property took place on G street? A. As I recollect it now, not until about 1887; commenced, I think, in 1887.

Q. Did that rise continue; and, if so, when did it culminate? A. Well, it continued quite rapidly the last of 1887, 1888, and
363 the end of 1889, perhaps all *of* 1889, *and culminated* in 1890; culminated in 1890, perhaps 1891.

Q. Where was your office in 1885, when you resumed business? A. On New York avenue between Fourteenth and Fifteenth for a few months only. I think in January, 1886, we came to 1423 F street, where I have been ever since.

Q. Did you ever sell any property on G street after you resumed business? A. Yes, sir.

Q. How many pieces? A. I do not know. I have now recollection of one particular piece only. I promised you I would look up the matter, but I have not done so; I have not had the time, but I recollect one piece of property that I sold on G street near Twelfth, in 1890.

Q. Did you sell any before that time? A. I do not remember now. I had property there for sale; had one or two pieces in the same square.

Q. Who put the property in your hands to sell? A. There was one piece of property owned by Robert S. Wharton, and the adjoining property—I cannot recall it—on G street we had to sell, and supposed we had sold, but Mr. Wharton withdrew from the transaction.

Q. Did you sell the piece of property for Mr. Kuhn? A. Yes, sir.

Q. When was that? A. I think it was in 1889 or 1890.

Q. That is pretty late—that was after the rise? A. Yes, sir; it was at least some time after the rise commenced. It was a piece of property that had been sold a year before to Mr. Petit, who represented Mr. B. H. Warner as the owner and took the title.

364 By Mr. TOTTEN:

Q. Are you telling what you heard or know? A. What I know.

Mr. DAVIDGE: Go on.

WITNESS: Do you want to know the price?

Mr. DAVIDGE: Yes.

A. I know the price that I sold it for, and I know the consideration named in Mr. Warner's deed—what he told me he sold it for.

Mr. TOTTEN: I object to that.

Q. What did you sell it for? A. $13,000.

Q. When was that? A. In the latter part of 1889 or first of 1890. I can refresh my memory.

Q. Where was that? A. On G street just this side of Twelfth, north side of G street. It was 22 feet by 96 or 98 feet, with a four-story brick house on it, the house then renting for $55 a month.

Q. How much, making a proper allowance, would be the value of the house—how much would that be a square foot? A. That I am hardly able to say. The house was a fair one, and the purchaser regarded the house of considerable value, because he remodelled it

and made a business house of it afterward. I cannot say what we made it worth at that time, although we did go into a calculation.

Q. That was in 1890? A. 1889 or 1890.

Q. Had you before that time any property put in your
365 hands for sale, say in 1885 or 1886—that far back; and, if so, at what price? A. We had a property just this side of the Kuhn property for $7,500.

Q. When was that put in your hands? A. That was in 1886, I think.

Q. How was that improved? A. That was improved by a two-story brick house, in fair condition only.

By Mr. TOTTEN:

Q. Where was that house? A. On G street between Twelfth and Thirteenth streets.

By Mr. DAVIDGE:

Q. About how much was that per square foot? A. Without counting the house, a little over $3.00, I think.

Q. What would it be worth now? A. It is very hard to say. It sold for $8,250 very shortly after we had it. Afterward we had it for $7,500, and the man withdrew, having sold it for that figure; he paid something to get out of the sale, and afterward put the price up to $8,500, as I understood.

Mr. TOTTEN: Give just as little of your understanding as possible.

WITNESS: I did not sell it.

Q. What would the property bring probably under the change of price? A. I should say two or three dollars; as much as that.

Cross-examination.

By Mr. TOTTEN:

Q. You said you were in the real-estate business and went out of it for a while. When did you first go into it? A. In
366 1872.

Q. When did you come out? A. I think it was in 1880.

Q. Then you went into the banking business? A. Not exactly. I was a gentleman of leisure; spent most of my time here and travelling around some.

Q. That was in 1884? A. 1885 I resumed business. I was here in 1884.

Q. You were not doing anything particularly during that interim? A. Yes, sir; trading in real estate and loaning money; not legitimately in business.

Q. You think $29,200 was a fair price for this property in March, 1884. Will you tell me how often you had occasion to examine that property and estimate its value? A. Only by comparing it with prices at which property sold at that time.

Q. How often did you look at it?

WITNESS: How often did I pass it?

Q. How often did you examine it; how often did you look at it when passing? A. That would be hard to say.

Q. Was it familiar to you? A. The property has been familiar to me for some time. I used to know people living there twenty years ago in one of the houses of this property.

Q. In making this estimate of $29,200 as being a fair valuation, how much did you allow for the buildings? A. I did not count them at all scarcely.

Q. You did not regard them of any value? A. Not for
367 the ordinary purpose for which property was bought. A good many persons would buy usually for the ground the buildings in that condition.

Q. The purpose for which you had it in mind was the purpose of speculation—buy to sell for more money? A. No, sir; I only had this idea in mind, that a person buying that property, unless for speculation, would not count the buildings of great value—no value whatever, if they were going to improve it right away.

EDWIN A. CUTTER.

Sworn to and subscribed before me this 27th day of February, 1893.

ALBERT HARPER, *Examiner.*

368 JAMES E. FITCH, being produced as a witness of lawful age *and* for and on behalf of the defendants and being first duly sworn, deposes and says:

By Mr. DAVIDGE:

Q. State your age, residence, and occupation. A. Age, fifty-six; occupation, real-estate broker; residence, Washington, D. C.

Q. How long have you been carrying on the business of real-estate broker? A. About twenty-eight years.

Q. Where, in that time, did you carry on the business? A. It was done in different parts of the city.

Q. I do not mean in what properties, but where your place of business has been during that time. A. On Seventh street between E and F streets; in the building on the avenue now occupied by the Attorney General's office and at the corner below here—1437 Pennsylvania avenue. Now I am at 1406 G street.

Q. Were you acquainted with the values of real estate on F and G streets, say, between the years 1882 and 1886? A. Yes, sir; as well as in other parts of the city.

Q. We are investigating a sale of real estate at the northeast corner of Ninth and G streets, the old Hitz property. Do you recollect it? A. Yes, sir.

Q. How many years have you known it? A. I should think about fifteen years I have known the property, whether owned by Mr. Hitz or not—that is, for that length of time certainly I have had knowledge of it.

369 Q. That property fronts 100 feet on G street and runs north on Ninth street 80 feet, and the east 30 or 40 feet has

greater depth on Ninth street, so that the dimensions of the property are somewhat upward of 8,000 square feet. It was sold on the 26th of March, 1884, for $29,200, being $3.50—a little more than $3.50—a square foot. I would be glad to know your opinion of the price paid for that property according to the prices prevailing at that time. A. I could judge somewhat of it, and the best way to judge of it is by a sale we made on F street about that time of some property belonging to my partner, Mr. Fox. He owned the southwest corner of Eleventh and F. We sold that for $28,000, to Mr. Moses. It was 50 by 96.

Q. And when? A. That was February 15, 1884. I have a memorandum of it here.

Q. How much a square foot was that? A. There was a houe upon the west 25 feet, an old brick building, three stories. I suppose that $5,000 would be a proper allowance for that. That would leave $23,000, or $4.80 per foot.

Q. Did you endeavor to sell the property on F street and also on Twelfth at about that time to Mr. Moses? A. On Eleventh; yes, sir. Mr. Fox made this sale himself to Mr. Moses, and advised him to take the lot 24 by 75, on Eleventh, in the rear of this purchase. I cannot recollect the exact price, but he declined to take it. Then Mr. Fox, on February 25, ten days later, sold to Mr. John W. Boteler a piece of property on F street, 25½ feet by 100 feet, improved by a very good building, which is now standing, and the lot in the rear that I wanted Mr. Moses to take, 24 by 75, making a total of

370 4,350 feet, for $20,250. I should put the F Street lot at about $3.00 a foot and the Eleventh Street lot at $2.00 a foot. That possibly should be changed a little, but I think that correct, and allow $9,000 for the building. The building was a pretty large one.

Q. You speak of the prices at that time—the early part of 1884? A. Yes, sir.

Q. Was the rise of property on F street before the rise on G street? A. Yes, sir; I should think it was; I should say for certain it was.

Q. When did G Street values go up, to the best of your recollection? A. To the best of my recollection, I should say within the last four years.

Q. You think that began how many years ago? A. About four years ago, I should say.

Q. Before the rapid rise of which you have spoken, for what purpose was property on G street valuable—for shops or residences? A. Well, it was somewhat a semi-condition, not very desirable for residences, nor was it quite suitable for business, as it is now.

Q. This sale to Mr. Moses of which you have spoken, was it about the beginning of the rise in values on F street? A. I think that building of Moses had a good deal to do with the rise.

Q. Did the Boston store follow that? A. Yes, sir; that followed that; I should think a year later.

371 Q. What would that corner sell for now, how much per square foot, irrespective of the buildings upon it? A. It is

pretty hard to tell, prices having gone up so rapidly, but I should say about $40.00 to $50.00 per square foot.

Q. Do you know what Mr. Moses subsequently gave for the Boteler lot on Eleventh street, of which you have spoken, if he bought it? A. I do not. That was an arrangement with Boteler. I heard at the time.

Q. Just after your knowledge of these specific sales on F street of which you have spoken, and your general knowledge in regard to values of the property I have mentioned, and in respect to which I wanted to know whether the price was fair, and give me your opinion.

WITNESS: About $3.50 a foot, was it?

Mr. DAVIDGE: Yes.

A. I should think it not an unfair price at all, the way things were then on G street.

Q. In selling a piece of property such as I have described, would you sell it in bulk or cut it up, a piece of property situated as that was? A. I do not know that it would be any advantage in selling in parcels, 80 by 100, especially in a business section as that was — is.

Cross-examination.

By Mr. TOTTEN:

372 Q. If you were to sell that property under the provisions of an ordinary deed of trust, such as prevails here, would you sell it for all cash or upon terms? A. Well, it is usual to sell on terms.

Q. What time? A. About a third cash; balance one and two years.

Q. With what interest? A. Six per cent.

Q. Could such a piece of property as that have been sold fairly at public auction at a forced sale, all cash, in your judgment, in 1884? A. I do not think that would make very much difference, property of that size—that kind of property, as I have said—business property. While it is the ordinary way to sell on time, I do not think that would make very much difference on that property.

Q. It would make some difference, would it? A. It might make some difference; not much.

Redirect examination.

By Mr. DAVIDGE:

Q. Explain why it would make very little difference, if any.

WITNESS: Why it makes any difference, do you mean?

Mr. DAVIDGE: Yes.

A. There might be a buyer who had not the money who might be ready if the terms were different.

Q. But could not anybody buy who was able to buy a large piece of property like that for one-third cash and balance, we will say, in one and two years—buy all cash, and immediately put a mortgage

upon the property and buy that way? A. No; you cannot borrow two-thirds the value of the property.

373 Q. How much can you borrow? A. One-half.

Q. Then he could get credit for a half? A. For a half, readily.

Q. Then in respect to half there would be no difference? A. Very little difference—just the difference between a half and a third.

JAMES E. FITCH.

Sworn to and subscribed before me this 27th day of February, 1893.

ALBERT HARPER, *Examiner.*

THOMAS E. WAGGAMAN, being produced as a witness of lawful age for and on behalf of the defendants and being first duly sworn, deposes and says:

Direct examination.

By Mr. DAVIDGE:

Q. State your age, residence, and occupation. A. Age, 53; 917 F street; real-estate broker and auctioneer.

Q. How long have you carried on that business? A. Ever since 1866.

Q. Were you acquainted with the values of real estate on F and G streets northwest near Ninth street, say, between the years 1881 and 1885? A. I know very little about the value of F street, having sold no property there. I bought my place in October,

374 1881, for which I paid $2.75 a foot, and at the time I bought the property in the rear was held at $1.25. It was afterward sold—I do not know whether it was a year or two years after—for $1.25 or $1.50. Those are all the facts I know about it.

Mr. TOTTEN: You do not know the last fact?

WITNESS: I know it was sold to McGill. I did not see the deed; I heard it said.

Q. Where is your place of business; how far from Ninth? A. 917 F street.

Q. How many feet from the corner of Ninth? A. I should judge a hundred feet.

By Mr. TOTTEN:

Q. From the corner of Ninth? A. Yes; there is the Masonic temple and one house—one or two houses.

By Mr. DAVIDGE:

Q. What square is that? A. 376.

By Mr. TOTTEN:

Q. It is the square bounded by F and G and Ninth and Tenth streets? A. Yes, sir.

By Mr. DAVIDGE:

Q. We are investigating the value of a piece of ground at the northwest corner of Ninth and G streets—Hitz' old property. The frontage is on G street one hundred feet, on Ninth 80 feet, and the east portion of the property runs back a depth a little more than on Ninth street, making a total of upward of 8,000 square feet; that property was sold on the 26th of March, 1884, for $29,200.

375 Do you know that property? A. I know the property.

Q. How long have you known it? A. Ever since I have been in the neighborhood.

Q. What, in your judgment, was a fair price at the time of that sale? A. I think that is as much as I would want to give for it.

No cross-examination.

THOS. E. WAGGAMAN.

Sworn to and subscribed before me this 27th day of February, 1893.

ALBERT HARPER, *Examiner.*

Adjourned to meet on Wednesday, March 1, 1893, at 2 o'clock p. m.

Met and adjourned to March 10, 1893, Friday, 2 o'clock p. m.

MARCH 10, 1893—Friday, 2 o'clock p. m.

Met pursuant to notice.

Appearances: Enoch Totten, Esq., solicitor for the complainant; Walter D. Davidge, Esq., and Morgan H. Beach, Esq., solicitors for the defendants, one of whom (Richard W. Tyler) is present; also the examiner and—

JOHN S. SWORMSTEAD, who, being produced as a witness of

376 lawful age for and on behalf of the defendants and being duly sworn, deposes and says:

By Mr. DAVIDGE:

Q. State your age, residence, and occupation. A. I am 48 years old; my residence is Washington, D. C., and my occupation real-estate broker.

Q. How long have you carried on that occupation? A. Since 1877.

Q. Where has your office been? A. At 928 F street northwest, part of the time, and 927 F street northwest, the balance of the time.

Q. That is F street between Ninth and Tenth streets, is it not? A. Yes, sir.

Q. Did you, about the year 1884 or 1885, sell any property on F street; if so, what, of what dimensions, and at what price? A. In 1885 we sold the property known as 928 and 930 F street. The dimensions were 41 by 169, if I remember aright—about that. We sold the property for $34,500.

Q. About how many square feet were there? A. In the neighborhood of 6,000—a few hundred more; between 6,000 and 6,500. I could not tell without referring to the plat or figuring.

Q. What building stands there now? A. The Atlantic building.

Q. What would that property sell for now?

WITNESS: The ground, you mean, or the building?

Mr. DAVIDGE: The ground.

A. About $20.00 a foot.

Q. Do you recollect when the rise in property took place on F street—when the rise in real-estate values took place? A. It
377 began to increase the year before that, I should think.

Q. And it continued to what time? A. Well, to within two years. I do not think there has been any rise in values in the last two years.

Q. Do you recollect about what time the rise in values took place in G street? A. It followed along, I should think, about a year and a half or two years after the rise on F street.

Q. Do you know the property, formerly called the Hitz property, at the northeast corner of Ninth and G streets? A. Yes, sir.

Q. Did you know it in 1884 and 1885? A. Yes, sir.

Q. That property fronts 100 feet on G street and runs back on Ninth street 80 feet, and the east portion of the lot runs back a little further than 30 feet, and the superficial contents being upward of 8,000 square feet. That property was sold on the 26th of March, 1884, for $29,200, being upward of $3.50 per square foot. Were you present at that sale? A. No, sir.

Q. Do you recollect that sale? A. No, sir.

Q. From your general knowledge of prices in that neighborhood, I wish you would give your opinion as to that price being a fair and adequate price or otherwise. A. As nearly as I can bring that time to mind, think of it now, I should say that that price was about the market price at that time—$3.50 a foot for that corner. As I can now recall the time, circumstances, and sur-
378 roundings, and the general value of property in that neighborhood and other neighborhoods, it occurs to me that that was about the market price or value.

Q. The sale was made by Thomas J. Fisher. He is now dead, as you know, I believe? A. Yes, sir.

Q. I wish you would state what were the reputation and standing of Mr. Fisher as an auctioneer.

Mr. TOTTEN: I object to that as wholly immaterial and incompetent.

A. There was no one who stood any higher in his profession. He was regarded as one of the most able and capable men in his business.

Cross-examination.

By Mr. TOTTEN:

Q. When did you make up your estimate of the value of this property in March, 1884?

WITNESS: I do not understand you. When did I make what?

Q. When did you make up the opinion which you have just given, that $3.50 per foot was a fair valuation of that property in 1884? A. Since my attention was called to this case.

Q. When was that? A. Within the last two or three weeks.

Q. In your estimate, did you take into consideration the number of feet, the situation of the property, and all that? A. I was told as I have been told now.

Q. How much did you allow in your estimate for the
379 building? A. Nothing.

Q. Did you give the matter much attention? A. No, sir.

Q. Have you a distinct recollection of the condition of things there in 1884? A. A distinct recollection is hard to get at. I have what I consider a fair recollection—yes, I characterize it as a distinct recollection. I think my recollection is very clear.

Q. How long have you been in the real-estate business? A. Since 1877.

JOHN S. SWORMSTEAD.

Sworn to and subscribed before me this 10th day of March, 1893.

ALBERT HARPER, *Examiner.*

Mr. Davidge here gives in evidence the record and proceedings in the case of Keyser, receiver, *vs.* Hitz *et al.*, in equity, No. 6583, so far as the same have not been given in evidence in behalf of the complainant, as follows:

380 Supreme Court, District of Columbia.

(Filed January 10, 1879.)

BENJAMIN U. KEYSER, Receiver, *vs.* JOHN HITZ and JANE C. HITZ, His Wife; E. P. Halstead, Robert B. Donaldson, Charles E. Prentiss, William R. Chipley, Sarah L. Crane, W. P. Jenks, and Richard W. Tyler.	No. 6583, Eq. Doc. 19.

EXHIBIT A TO BILL.

John Hitz *et ux.* to R. B. Donaldson and Charles E. Prentiss.	Deed of trust. Dated January 26, 1876, and recorded January 27, 1876.

Conveys property in question to secure two notes of William R. Chipley, dated January 5, 1877, for ten thousand dollars each, payable to E. P. Halstead, trustee, in one and two years, at ten per cent.

EXHIBIT B TO BILL.

First Chipley-Halstead note.

EXHIBIT C TO BILL.

Second Chipley-Halstead note.

381 EXHIBIT D TO BILL.

R. B. Donaldson and Charles E. Prentiss, trustees, to Jane C. Hitz.	Deed of release, dated June 16, 1877, and recorded June 20, 1877.

Recites payment of Chipley-Halstead notes; releases property in question.

EXHIBIT G TO BILL.

Sarah L. Crane to B. U. Keyser, receiver.	Deed of trust, dated November 11, 1878, and recorded November 13, 1878.

To secure, if necessary, Halstead-Chipley notes, and to collect rents and profits of property pending trust.

January 10, 1879.—Subpœna to answer.
January 25, 1879.—Separate answer of William P. Jenks.

EXHIBIT 1 TO ANSWER OF R. W. TYLER.

Abstract of title, Ashford and Hopkins, upon property.
January 25, 1879.—Replication and joinder on answers of Jenks and Tyler.
January 25, 1879.—Separate answer of R. B. Donaldson.
February 4, 1879.—Appearance of R. D. Mussey, as solicitor for Halstead, Prentiss, and Crane.
February 5, 1879.—Appearance of W. S. Cox for John Hitz and wife.
382 March 4, 1879.—Injunction, undertaking filed and approved.
May 26, 1879.—Separate answer of E. P. Halstead.
June 6, 1879.—Separate answer of C. E. Prentiss.
June 6, 1879.—Separate answer of Sarah L. Crane.
June 6, 1879.—Cross-bill of Sarah L. Crane against B. U. Keyser for cancellation of deed of November 11th, 1878.
June 11, 1879.—Replication and joinder on answers of Halstead, Prentiss, and Crane.
July 1, 1879.—Separate answer of John Hitz.
September 8, 1879.—Replication and joinder on answers of Donaldson, John Hitz, and Jane C. Hitz.

September 18, 1879.—Answer of Keyser, receiver, to cross-bill of Sarah L. Crane.

September 20, 1879.—Separate answer of William R. Chipley.

September 20, 1879.—Replication and joinder.

October 21, 1879.—Leave to Jane C. Hitz to file cross-bill, and cross-bill filed.

November 17, 1879.—Answer of John Hitz to cross-bill of Jane C. Hitz.

November 25, 1879.—Joinder on same.

December 30, 1879.—Answer of defendant John Hitz to amended and supplemental bill of Keyser filed.

January 3, 1880.—Answer of B. U. Keyser to cross-bill of Jane C. Hitz.

January 3, 1880.—Joinder thereon by Jane C. Hitz.

January 3, 1880.—Amended and supplemental bill of B. U. Keyser, receiver.

383 January 3, 1880.—Answer of Jane C. Hitz to amended and supplemental bill of Keyser.

January 29, 1880.—Answer of R. W. Tyler to cross-bill of Jane C. Hitz.

January 29, 1880.—Answer of William P. Jenks to cross-bill of Jane C. Hitz.

November 13, 1880.—Amendment of cross-bill of Jane C. Hitz filed.

November 17, 1880.—Stipulation that case may be heard as if John Hitz, Jane C. Hitz, R. B. Donaldson, W. R. Chipley, W. P. Jenks, R. W. Tyler, E. P. Halstead, and C. E. Prentiss had severally answered Sarah L. Crane's cross-bill, denying the equities thereof as against them, and as if she had filed replication.

November 17, 1880.—Stipulation for hearing as if Sarah L. Crane had filed replication to Keyser's answer.

November 17, 1880.—Stipulation for hearing as if defendants Prentiss, Crane, and Halstead had answered, denying equities of Jane C. Hitz's cross-bill, and as if Jane C. Hitz had filed replication thereto.

November 17, 1880.—Stipulation for hearing as if Jenks, Tyler, Prentiss, Halstead, and Crane had answered, denying equities of Keyser's amended and supplemental bill, and as if Keyser had filed replication.

384 November 20, 1880.—Order allowing amendment of cross-bill and testimony thereon to be taken.

November 20, 1880.—Motion for same and affidavits in support thereof.

November 26, 1880.—Order allowing deed of June 16, 1877, from Hitz *et vir* to Crane to be photographed or lithographed.

November 27, 1880.—Answer of R. W. Tyler to Jane C. Hitz's amendment.

November 27, 1880.—Answers *to* Prentiss and Crane to same.

November 27, 1880.—Stipulation as to Halstead's answers to same and replication.

November 27, 1880.—Answer of John Hitz to amendment by Jane Hitz of her cross-bill.

November 29, 1880.—Answer of W. P. Jenks to same.

December 2, 1880.—Answer of B. U. Keyser to same.

June 28, 1881.—Opinion of Justice Wylie dismissing bill and ordering hearing on cross-bill.

December 5, 1881.—Bond of Tyler, receiver, filed for approval.

December 17, 1881.—Undertaking by Jane C. Hitz for appeal to general term.

December 21, 1881.—Undertaking by Jenks for appeal to general term.

December 21, 1881.—Undertaking by Keyser for appeal to general term.

December 11, 1883.—Appeal of Jane C. Hitz to Supreme Court of the United States.

385 Supreme Court, District of Columbia.

(Filed December 14, 1883.)

BENJAMIN U. KEYSER, Receiver,
vs.
JOHN HITZ ET AL. } Equity. No. 6583.

Petition to Have Amount in Registry of Court (Paid by Him) Decreed to be Paid on Account of Judgment against Hitz.

January 21, 1884.—Answer of Jane C. Hitz.

February 5, 1884.—Answer of Richard W. Tyler.

October 30, 1884.—Motion by Jane C. Hitz in general term for an account and distribution by auditor of rents and profits collected by Keyser as well before order of December 15, 1881, as after.

April 7, 1885.—Exceptions of Jane C. Hitz.

April 27, 1885.—Exceptions of William P. Jenks.

June 19, 1885.—Exceptions of Benjamin U. Keyser.

July 24-31, 1885.—Receipt of Richard W. Tyler of money from registry of court.

October 30, 1885.—Appeal bond of Jane C. Hitz with E E. White as security.

February 11, 1889.—Mandates (2) United States Supreme Court, decree to file; execution for costs.

June 2, 1890.—Motion for reference to special auditor to tax costs.

386 June 16, 1890.—Reference to Job Barnard as special auditor.

December 1, 1890.—Report of special auditor confirmed.

4th Mackey's Report, page 179, Keyser *vs.* Hitz *et al.*

123rd U. S. Reports, page 297, Hitz *vs.* Jenks *et al.*

Rule of Court.

Equity rule 80 of the Rules of Practice in the Supreme Court of the District of Columbia, published 1875.

"The auditor, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed they shall stand for hearing before the court, if the court is then in session, or, if not, then at the next sitting of the court which shall be held thereafter, by adjournment or otherwise."

387 ORA L. PITNEY, being produced as a witness of lawful age for and on behalf of the defendants, and being first duly sworn, deposes and says:

By Mr. DAVIDGE:

Q. State your age, residence, and occupation. A. I am 54 years old, my residence is 1511 L street northwest, and I am a real-estate broker.

Q. How long have you been a real-estate broker? A. Since the 1st of August, 1884.

Q. What had been your occupation before that time? A. Some few years before that I had no special occupation. I had been out West, engaged in some matters in which I lost money—speculating.

Q. Then you started business here as a real-estate broker in August, 1884? A. Yes, sir.

Q. Did you proceed to acquaint yourself with prices at that time? A. I endeavored to do so.

Q. Where did you carry on that business? A. I started at 1313 F street.

Q. Alone or in a copartnership? A. With Mr. Bradford.

Q. I wish to know whether you sold any property on G street or were employed to sell any in or about the year 1886; and, if so, what prices of property and where situated. A. On May 3, 1886, I sold to Myra D. Haywood, on 13th street between G and H streets, premises 737. At the same time I had for sale property 1215
388 G street. They were both same price—$8,000. Mrs. Haywood took the 13th Street property in preference to the G Street, though they were both at the same price—that is, $8,000.

Q. What was the property on G street? A. I was a three-story brick building, owned by Mr. Henderson, cigar dealer on 15th street. It was 18 feet 6 inches front by 96 feet deep. That would be $4.50 and a fraction of a cent a foot, including improvements. Then, about that time—I cannot fix the day exactly because I did not make a memorandum of it on the book, but I remember it was

about that same time—I had this property of the Cowlings on the north side of G street, west of 13th street, for sale at $2.50 a foot. I made some effort to sell that property, but found no encouragement and dropped it after a while. I saw a great number of persons.

Q. That is the property where the Cowling stables are? A. Yes, sir.

Q. Near the Epiphany church? A. Yes, sir.

Q. You tried to sell that early in 1886 at $2.50? A. At about that time I sold this property to Mrs. Haywood. I cannot fix the date exactly, only approximately. I think it was before I sold the property to Mrs. Haywood.

Q. What was the result of your effort to sell the Cowling property? A. Oh, I found no customer and abandoned it.

Q. And did you abandon the sale? A. That is, I made no further effort to sell it. I did not find a buyer.

Q. How much per foot would that Cowling property sell for now? A. I think it would bring $12.00 or $15.00 a foot.

389 Q. You have mentioned the sale of a house on 13th street near G, which the purchaser took in preference to another which you had for sale on G street, in the neighborhood. Both of these pieces of property, I understand, were held at $8,000? A. $8,000; yes, sir.

Q. And you sold one of them at that price to Myra D. Haywood? A. Yes, sir.

Q. I wish you would state how that property was improved. A. That was improved by a three-story and basement brick house. It was a house about two years old, I think. The lot was only 50 feet deep, and I think 20 feet front. That is my recollection.

Q. At that time the rise in property on G street had not taken place, had it? A. No; because Mrs. Haywood regretted afterward very much that she did not buy the G Street property.

By Mr. TOTTEN:

Q. How do you know she regretted it? A. Because she said so.

Mr. TOTTEN: I object to the hearsay testimony.

Q. We are engaged in an inquiry as to a fair price for the Hitz old property on the 26th of March, 1884, which property is at the northeast corner of Ninth and G streets——

WITNESS: That was before the date I was in business.

Q. According to the prices obtaining when you went into business, what would be a fair rate for that property? A. I can

390 make my estimate on that because of the prices in the neighborhood. The first piece of property I got was from an old lady on the east side of Ninth street near I—between H and I streets—named Lindsley. She wanted to get $2.00 a foot for the ground—wanted an offer on it—but that was her asking price. That is the nearest piece of property to this corner that I recollect. I should say that that property on the corner was hardly worth twice as much. I say somewhere from $3.00 to $4.00 a foot that property would have brought; probably over $3.00, but not above

$4.00 under very favorable circumstances. Some man who wanted that property to pay a fancy price, $4.00 a foot would be a fair price; a top price.

Cross-examination.

By Mr. TOTTEN:

Q. You tried to either sell or buy that property some few years ago, did you not?

WITNESS: This Hitz property?

Mr. TOTTEN: Yes.

WITNESS: On the corner?

Mr. TOTTEN: Yes.

A. No, sir.

Q. Did you not come to me and try to effect a sale of that property some years ago? A. I have no recollection of it, if I did. I do not think I had the price on it.

Q. In making your estimate of the value of this property on the corner of Ninth and G streets how much did you estimate for the buildings on it? A. I should not regard the buildings as worth very much, because they were very old buildings, and property of that price, $3.00 and upward, a man would want good build-
391 ings on.

Q. You did not investigate the question of real-estate values here until August, 1884? A. No; I had no special interest in doing so.

Q. Had you any knowledge of real estate in this city or District? A. Only a chance knowledge of the property sold here and there. I had no knowledge any more than any person would who lived in the city.

ORA L. PITNEY.

Sworn to and subscribed before me this 10th day of March, 1893.

ALBERT HARPER, *Examiner.*

JOHN JOY EDSON, being produced as a witness of lawful age for and on behalf of the defendants and being first duly sworn, deposes and says:

By Mr. DAVIDGE:

Q. State your age, residence, and occupation. A. I am 46 years old; my residence is 1324 16th street northwest, and I am the secretary of the Equitable Building Association.

Q. Were you familiar with prices of real estate on F and G streets northwest in 1884—1882, '3, '4 '5, we will say—along there? A. I think I was as familiar as most of the business men in Washington.

392 Q. How did you become familiar with them? A. My business is principally loaning money, almost entirely so, and my business has been right in the heart of the city for the last twenty years.

Q. Where was your place of business in 1884 and before that time? A. I think that my office was 711 G street in 1884; I would not be positive about that, but about that time we moved over on Seventh street opposite the Patent Office. I would have to refresh my memory in that regard, to say the date we moved.

Q. Where is your place of business now? A. No. 1003 F street northwest.

Q. In the large building of the company? A. Yes, sir.

Q. Are you familiar with what used to be called the Hitz property, on the northeast corner of Ninth and G streets? A. I know it very well.

Q. How long have you known it? A. I have known it for twenty or twenty-five years.

Q. And how well? A. I have been in it a great many times. I used to call on Mr. Hitz very frequently when he had his office there. I used to attend meetings there when the Homeopathic dispensary was there.

Q. We are investigating a sale of that property on the 26th of March, 1884. The property fronts, as you may know, about 100 feet on G street, and on Ninth 80 feet, and the east end of the lot runs back further than the west end, and the superficial con-
393 tents of the lot are upward of 8,000 feet. That property was sold, with the improvements at the time I have mentioned, for $29,200. I wish to know your opinion as to the adequacy of that price. A. As nearly as I can remember, at that time $3.50 or $4.00 a foot was a good price for it. I remember a sale, and I think it was this sale. It was made published in the papers, and I thought at the time it was a good price. I remember thinking of that when it was made. Has there been any other transfer beside this from Mrs. Hitz?

Mr. DAVIDGE: No; this was not transferred about that time by Mrs. Hitz.

WITNESS: The sale, I mean.

Mr. DAVIDGE: The sale was by Mr. Tyler, trustee.

WITNESS: It was announced in the paper.

Mr. DAVIDGE: It may have been.

Q. What is your opinion? A. I think at the time that sale took place—of course I cannot tell who sold it or the exact incidents attending the sale, but I remember thinking at the time that the sale took place that it was a good sale. That is my recollection.

Q. What time did property go up on G street—can you recollect in what year? A. The rise in property on G street followed the rise on F, and the property on F street did not begin to rise until after 1882 or 1883—at the time that the Beneficial Endowment Association built and at the time that the church began to lease the property and build up F. The G Street property did not begin
394 to rise until after that—probably three years after that—three or four years.

Q. Then it began; and when was the great rise on G street? A. That was recently. The great rise in G Street property—that

is, $10.00 a foot—did not take place until here a couple of years ago; the big rise.

Q. You have spoken of the Endowment building. I think that is on F street a little west of Ninth? A. Yes; that is where the Columbia national bank is now.

Q. Was that property offered to you in 1882? A. No, sir; the adjoining property.

Q. At what price? A. It was offered to me at $2.75 a foot.

Q. By whom? A. Thomas J. Fisher.

Q. Representing the church? A. No; that did not belong to the church.

Q. Representing Gonzaga college? A. I think so.

Cross-examination.

By Mr. TOTTEN:

Q. Did you buy or sell any property in 1884 in the vicinity of the corner of Ninth and G streets? A. No; I have never.

Q. Have you ever been engaged in the business of buying and selling real estate at all? A. Not as a business. I have bought and sold real estate; never engaged in the business.

Q. You have never been engaged in the business of buying
395 real estate? A. Except on my own private investment.

Q. Have you bought and sold much as a private investment? A. I am a pretty good buyer.

Q. You say $3.50 or $4.00 was a fair estimate for this property in March, 1884. Do you in making that estimate count anything for the improvements on the property? A. Yes; I never regarded the improvements as amounting to much. The building was a rather poorly constructed building, cheaply constructed. I looked upon it that the improvements did not amount to anything, comparatively.

Q. Then the estimate you have mentioned would be the land? A. Yes; without the improvements.

Q. That is a very desirable corner, is it not? A. Very desirable corner, I consider it.

Redirect examination.

By Mr. DAVIDGE:

Q. You say you have never been in the business of buying and selling. Does not your business of loaning money familiarize you with the prices of real estate? How do you make your loans? A. Entirely on real estate.

Q. Do you keep posted as to existing real-estate values? A. I think there are but very few men in Washington who have loaned as much money on real estate as I have. Of course, we have to scrutinize the value very carefully.

396 Recross-examination.

By Mr. TOTTEN:

Q. When you start out to loan money on a given piece of property, in the first place you ascertain its fair value. Then how much do you loan on it—one-half its value, or one-quarter, or one-third, or two-thirds? A. We loan a little more than the brokers do.

Q. What do the brokers generally loan? A. Sixty per cent., or two-thirds, or what they consider two-thirds of its value.

Q. And you loan a little more than that? A. We loan three-fourths.

JOHN JOY EDSON.

Sworn to and subscribed before me this 10th day of March, 1893.

ALBERT HARPER, *Examiner.*

RICHARD W. TYLER, being a witness of lawful age and one of the defendants and being first duly sworn, deposes and says:

By Mr. DAVIDGE:

Q. State your age, residence, and occupation. A. I am 50 years old; my residence is Washington, D. C., and my occupation real estate and loans, principally.

Q. How long have you been engaged in that occupation? A. I have been in business here since 1872, I think; in the busi-
397 ness of negotiating loans since 1876 and '7, along there; more especially in the real-estate business a little later.

Q. You made the sale in controversy in this case, did you not? A. Yes, sir; as trustee.

Q. Did you negotiate the loan from Mr. Jenks, of Philadelphia? A. Yes, sir.

Q. Do you recollect the amount of that loan? A. Yes, sir.

Q. How much? A. $20,000.

Q. How represented—what form did the loan take? A. The loan was made and one note taken for the money. That note was secured by the deed of trust under which the property was sold.

Q. Was the note indorsed? A. Yes, sir.

Q. By whom? A. John Hitz.

Q. And who was the maker of the note? A. Sarah L. Crane.

Q. In March, 1884, was the note overdue; if so, how long had it been overdue? A. I think it had been overdue nearly four years from the date of the maturity of the note on its face. It may have come to maturity by default prior to that time—by reason of default in the payment of interest.

Q. How long did the note run? A. It was made for three years.

Q. What was the date of the deed of trust? A. I think it was June 18, 1877.

398 Q. Can you tell when Mr. Jenks, the creditor, died? A. No, sir; it was several years after this sale.

Q. Before the filing of this bill, however, was it not? A. Yes, sir.

Q. At the time of the sale how did the property stand in respect of insurance and taxes? Can you tell? A. No, sir; I cannot answer that question now. I did not expect to be examined today. I would have to refer to the records to find out.

Q. I will ask you before the next meeting to make inquiry, to be able to answer that question. Who made the sale of this property on the 26th of March, 1884? A. Thomas J. Fisher, as auctioneer.

Q. Were you present at the sale? A. Yes, sir.

Q. What time did you get on the ground—how long before the sale? A. A half hour.

Q. Was Mr. Jenks at the sale? A. Yes, sir.

Q. Did you know before the sale that either Mr. Jenks or Mr. Caldwell intended to buy the property? A. No, sir.

Q. Did you observe the company present at the sale? If so, state about the number. A. I should think there were about forty present, beside a lot of children and usual assemblage that generally gathers around a sale.

Q. How long was the property cried by Mr. Fisher? A. I should think in the neighborhood of a half hour—from twenty minutes to a half hour.

399 Q. About how many bids were made, if you can recollect? A. I think it was started at about $20,000. There was quite a number of bids, ten or a dozen, maybe more, maybe less.

Q. And knocked down at what price? A. $29,200.

Q. And to whom? A. Seth Caldwell, Jr., of Philadelphia.

Q. You advertised this property for sale in bulk. Will you state why you did it? A. There were several reasons.

Q. State them. A. The principal reason was that I thought it was a class of property that ought to be sold in bulk; that it would sell to better advantage.

Q. You also advertised it for sale for cash. Why did you do that? A. One reason for advertising it for sale for cash was that the indebtedness had been a long time overdue, and there was a large amount of accrued interest overdue and unpaid, and taxes for a number of years had accumulated. The property had been sold for taxes, and the insurance had been unpaid, and it was left to the discretion of the trustee. It seemed to be *to be* best, under the circumstances, to sell it for cash.

Q. A party buying a large piece of property like that all cash can, upon his purchase, receive, by way of loan to be secured by deed of trust, about how much, what percentage?

WITNESS: Borrow on the property?

Mr. DAVIDGE: Yes.

400 A. From a half to three-quarters of the value; in some instances more.

Q. No difficulty in the market about that, is there? A. No, sir; not on that class of property.

Q. Had you occasion to value this property before the loan was made? A. Yes, sir.

Q. What was your estimate of it? A. My valuation of the land

was $2.75 a foot. I stated that as the valuation of the land when I asked Mr. Jenks for the loan for Mrs. Hitz.

Q. Then you negotiated this loan acting in behalf of Mrs. Hitz? A. Yes, sir; I gave that as a valuation after a very careful investigation and conference with a number of the gentlemen in whom I had confidence at that time and who were in a position to be good judges of values.

Mr. TOTTEN: I object to the hearsay part of that answer.

Q. Bring out a little more of it. State what pains you took to ascertain the real value of the property at the time the loan was applied for. A. I took occasion to make inquiries, as I have just stated, of a number of gentlemen who were familiar with values and in whom I had confidence. I was not very well experienced at that time; I was comparatively new in the business of making loans, and I think I was timid, and I leaned very much upon the judgment of others—sought the judgment of others in ascertaining values for loans.

Q. This valuation included improvements, did it not?

WITNESS: $2.75 a foot?

Mr. DAVIDGE: Yes.

401 A. No, sir; that is the value I put upon the ground. I stated, however, to Mr. Jenks, of whom I obtained the loan——

Mr. TOTTEN: I object to that.

Mr. DAVIDGE: Go on.

WITNESS: That I valued the property at $30,000 as it stood; that I thought it could be sold for $30,000 as a whole.

Q. And that took in not only the land, but the improvements? A. The improvements.

Q. And thereupon he consented to make the loan? A. Yes, sir; he said if I thought it would bring $30,000 he thought $10,000 margin would be sufficient.

Q. He had also, as I understand, the indorsement of John Hitz? A. Yes, sir.

Q. What was the reputation of John Hitz at that time as a man of means?

Mr. TOTTEN: That is objected to as immaterial.

A. I think it was very good at that time. I considered it good at that time.

Q. What did he do—what business did he carry on? A. He was the president of the German-American national bank and also of the German-American Fire Insurance Company. He had been for a number of years consul-general of Switzerland. I do not know but what he was then.

Q. At that time were those institutions in high repute or otherwise? A. I think they were in good repute.

402 Q. I wish you would state what was the condition of the improvements at the time the sale took place. A. The improvements were in a very dilapidated condition.

Q. Describe in what manner. A. I do not think they were fit for occupancy, really. The joists and floors of the shops fronting on Ninth street were practically rotted out; also the first floors of the two dwelling-houses fronting on G street. The property was very badly run down; had not been repaired—kept up in order—at all.

Q. State the character of the improvement at the corner of Ninth and G. A. There was a building on the corner having a frontage of 80 feet on Ninth street by, I should think, about 35 feet on G street, which was divided by partitions into five stores.

Adjourned to—

MARCH 11, 1893—Saturday, 1 o'clock p. m.

Met pursuant to adjournment.

Owing to absence of witness, further adjourned, subject to agreement.

MAY 12, 1893—Friday, 2 o'clock p. m.

Met pursuant to agreement.

Appearances: Messrs. W. D. Davidge and Morgan H. Beach, solicitors for the defendants, one of whom, Richard W. Tyler, is present; Enoch Totten, Esq., solicitor for the complainant; also the examiner and—

403 ALBERT A. WILSON, who, being produced as a witness of lawful age for and on behalf of the defendants and being first duly sworn, deposes and says:

Direct examination.

By Mr. DAVIDGE:

Q. What is your age, residence, and occupation? A. I am fifty-three years old; my residence is 2000 G street northwest, and my occupation is real estate.

Q. How long have you lived in the city of Washington? A. All my life.

Q. Did you have in your hands for sale in 1878 or 1879 and afterward property on G street north, in this city, between Tenth and Eleventh streets west, on the north side; if so, when was it placed in your hands for sale and by whom? A. I did. I had some property on the northwest corner of Tenth and G streets, in square 345—I think that is the square—placed in my hands along about 1878 by the Sisters of the Visitation, who formerly had a school and convent there. I think that was about the year.

Q. The school was on one side and the convent on this? A. That is where their school was. They owned the property. They moved in 1877 up on Connecticut avenue and built that place up there.

Q. What efforts did you make to sell that property, and with what result? A. I advertised it. To the best of my recollection, I had a sign on the corner, which was a vacant lot with a brick wall

around it—had sign on there giving the dimensions, usual for-sale sign.

404 Q. With what result—how long before you had an offer? A. I had a great many inquiries about it, but I cannot state the exact date. I finally got an offer from a gentleman here in the real-estate business, Mr. John Sherman, a young man who used to be here in business. I do not know what has become of him.

Mr. TOTTEN: He has gone to California.

WITNESS: Yes; gone out there somewhere, I heard. This was the corner property.

Q. Confine yourself to the corner property—tell the dimensions. A. That was one. The vacant ground was 45 feet, and then there was a front of 25 by a depth of 124 feet to an alley. The price that I asked for that property was $2.50 a foot. Mr, Sherman made a cash offer of $2.10 for it and they accepted it.

Q. When was that? A. I will have to refresh my memory about that.

Q. You can refresh your memory by referring to the papers. A. I looked over some papers and found it was April, 1883. It was 70 feet front by 124 deep, at $2.10 a foot for 8,680 square feet.

Q. Have you before you a memorandum whereby you are enabled to state with precision the time and the amount of the sale?

WITNESS: The time of what? What do you mean by time? This was a cash sale, sold at that date.

Mr. DAVIDGE: Whether you have before you a memorandum that enables you to state the time and the price of the sale?

A. I have.

405 Q. What sort of a house was it? A. The house was what you might call a three-story and basement—you might call it a four-story house. The entrance was right from the ground The house was not of much account; really, in fact, did not take the house into consideration; just put the piece in as ground.

Q. Later did you sell some other property on G street north, in the same square? A. Yes, sir; I think it was February 15, 1886, according to the memorandum, I sold a lot adjoining on the west, with 29½ feet front by the same depth. That had a house on it—quite a large house. I sold that to the Scottish Rites Masons—I sold to Mr. Duncanson, but he bought it for them—for $13,000. There was a deed of trust on it for $6,500, and they paid the difference in cash and assumed the trust. The Real Estate Title Company had the trust on it.

Q. The Scottish Rites Masons have that property now? A. Yes, sir.

Q. The same house is still there? A. Yes, sir; the main house is there. They have built a large hall in the rear of it. It seems to be a large building. I have not been there but once.

Q. Did you sell another piece of property there? A. Yes, sir. They owned then the property adjoining that, directly west. That I sold to Steiger and Liebermann—Charley Leibermann, rather. Here I happened to find a copy of the receipt, showing a deposit of

$100 on the 11 day of February, the time the sale was closed for that. Both sold at about the same time. That had a house on it. It was 139 feet deep. There was an alley that came off the
406 lot. It was deeded to the city and a public alley was made of it.

Q. How much was gotten for that? A. $9,000.

Q. Sold to whom? A. This says: "Received of Mr. Lewis J. Davis one hundred ($100) dollars as a deposit on account of the purchase of lot numbered twenty-four (24), in the Sisters of the Visitation subdivision of parts of original lots numbered two (2), four (4), and sixteen (16), square numbered three hundred and forty-five (345), into lots numbered twenty-three (23) and twenty-four (24), this city," etc.; that was the receipt given at the time of the deposit.

Q. Do you know what Mr. Davis, some years afterwards, sold that property for? A. I do not know of my own personal knowledge. I have been told, and it was published somewhere in the newspapers.

Q. What have you understood it has been sold for?

Mr. TOTTEN: I object to that.

A. I was told that he got $52,000 for it. I do not know it of my own personal knowledge, I was told that, and it was so published. The Palais Royal bought it. It is part of their building.

Q. Their building is at the corner? A. It abuts right up to the Scottish Rites building, that piece of property does.

Mr. TOTTEN: That is the northeast corner of Eleventh and G streets.

WITNESS: There were two other houses that belonged to
407 Lewis Davis' family. These two houses and the Sisters of the Visitation took the whole front of that block.

Mr. DAVIDGE: I thought that the Palais Royal was at the corner of Eleventh and G streets.

WITNESS: Yes, but it runs down and takes in one of these houses.

Q. Have you with you a copy of the agreement of sale to Davis? A. I have it.

Q. Have you any objection to filing a copy? A. I have not (producing paper).

$100.# WASHINGTON, D. C., *Feb'y 11th*, 1886.

Received of Mr. Lewis J. Davis one hundred ($100) dollars, as a deposit and on account of the purchase of lot numbered twenty-four (24), in the Sisters of the Visitation subdivision of parts of original lots numbered two (2), four (4), and sixteen (16), square numbered three hundred and forty-five (345), into lots numbered twenty-three (23) and twenty-four (24), this city, with the improvements thereon, being house No. 1009 G Str. N. W., sold him this day for the sum of nine thousand ($9,000) dollars, to be paid as follows: Said Davis to assume, as part of the purchase-money, the payment of a certain promissory note to the Real Estate Title Co. D. C. for $4,500 and

interest thereon, at the rate of five per centum (5%) per an-
408 num, from Feb'y 15th, 1886, payable semi-annually, said note being dated Oct. 1st, 1883, and made payable in two (2) years from date; and upon maturity the time for payment of said note was by resolution of the board — of Real Estate Title Co. extended for 2 years from Oct. 1st, 1885, same rate of interest, said note being secured by deed of trust on the beforementioned real estate duly recorded Oct. 5th, 1883—1057, 135—the balance of the purchase-money, viz., forty-five hundred (4,500) dollars, to be paid cash.

All taxes to be paid and allowed for by the vendor up to 15th Feb'y, 1886, and the rent of said premises to go to purchaser from Feb'y 15th, 1886.

Title to be good and unencumbered (save and except the above-mentioned deed of trust) and transferred to said Davis by a proper deed of conveyance to be prepared by Mr. Ashford or deposit money refunded.

(Signed) STEIGER & LIEBERMAN,
Ag'ts for A. A. Wilson, Representing the Owners.

Mr. DAVIDGE: I here give in evidence the foregoing paper.
Mr. TOTTEN: Cross-examination waived.

ALBERT A. WILSON.

Subscribed and sworn to before me this 12th day of May, 1893.
ALBERT HARPER, *Examiner.*

409 ROBERT G. RUTHERFORD, being produced as a witness of lawful age for and on behalf of the defendants and being first duly sworn, deposes and says:

Direct examination.

By Mr. DAVIDGE:

Q. What is your age, residence, and occupation? A. I am fifty-four years old; my residence is 1811 Nineteenth street, Washington, D. C., and my occupation is that of real estate and insurance agent and broker.

Q. Were you present at the sale of the Hitz property, on the northeast corner of G street north and Ninth street west, on the 26th of March, 1884? A. Yes, sir.

Q. Were you one of the trustees? A. No, sir.

Q. Was Mr. Tyler? A. There was but one trustee, and that was Mr. R. W. Tyler.

Q. And you and Mr. Tyler are partners in business? A. Yes, sir.

Q. Do you recollect the dimensions of the property? A. Yes, sir.

Q. Give them to us. A. It was 80 by 100, and a fraction at the east end, making a total of 8,162 square feet.

Q. What did the property sell for? A. It sold for $29,200.

Q. State, as well as you can recollect, what company was
410 assembled at that sale—about how many persons. A. There was a good company there. I would say from twenty-five to thirty-five persons, possibly more.

Q. Do you recollect at what price the property was started? A. No, sir; I do not.

Q. Do you recollect about the number of bids or whether there was a number of bids? A. There was a number of bids, but I could not say how many.

Q. Who made the sale? A. Mr. Thomas J. Fisher was the auctioneer.

Q. What was his opinion of the sale, if you know?

Mr. TOTTEN: I object to that.

A. I heard Mr. Fisher say that the property brought an excellent price, more than he had expected.

Mr. TOTTEN: I object to the answer because it is hearsay, and I shall ask the court to strike it out.

Q. Where did Mr. Fisher say that? A. At the conclusion of the sale.

Q. Do you recollect any persons who were in the crowd? A. Yes, sir; I knew some of them.

Q. State whom you recollect. A. Mr. C. A. Snow, Mr. Smith Pettit, Mr. James Robbins, a builder; Mr. Plant, Mr. Freund, Mr. Seth Caldwell, Mr. W. P. Jenks, and, I think, Mr. James H. Marr was also there, but I am not positive about that.

Q. You were in the real-estate business at that time, were you not? A. Yes, sir.

Q. Familiar with prices? A. Somewhat so.

411 Q. State whether, in your judgment, the property brought a fair price. A. It brought a very full price.

Cross-examination.

By Mr. TOTTEN:

Q. You are a partner of Mr. Tyler, the trustee who made the sale in this case? A. Yes, sir.

Q. How long have you been his partner? A. Since April, 1877.

Q. You have been engaged together in the real-estate business all that time, I believe? A. Yes, sir.

Q. Did Mr. W. P. Jenks make a bid? A. Not to my knowledge.

Q. William P. Jenks was the owner of the indebtedness? A. Yes, sir.

Q. And Seth Caldwell, mentioned by you, was his agent and attorney, was he not? A. No, sir; not to my knowledge.

Q. He bid the property in for Mr. Jenks? A. He bought the property. I do not know whom he bought it for.

Q. Do you know anybody else who made a bid besides Caldwell? A. No, sir.

Q. Did you make a bid? A. No, sir.

Q. Were there any dummy bids? A. I do not think there were.

412 Q. I do not mean by anybody but the auctioneer who cried the sale. Did he make any dummies? A. No, sir; I think it was a straight sale.

Q. You think there were from twenty-five to thirty-five persons present. That comprised the usual variegated audience on such occasions, did it not? A. I could not say about that. It was a very good company. I do not think there were many street urchins there.

Q. There were little darkies and big darkies about? A. I do not remember.

Q. At all events, there were as many as twenty-five to thirty-five present? A. I can recollect there were at least twenty-five, maybe thirty-five, present.

Q. Who is James Robbins? A. He is a very well-known builder here in the city.

Q. Did he make a bid? A. I do not know that he did.

Q. Do you know of anybody who made a bid aside from Seth Caldwell? A. Mr. Snow made a bid.

Q. Yes; Mr. Snow has testified here, I believe. Did Mr. Tyler make a bid, to your knowledge? A. No, sir.

ROBERT G. RUTHERFORD.

Subscribed and sworn to before me this 12th day of May, 1893.

ALBERT HARPER, *Examiner.*

413 SMITH PETTIT, being produced as a witness of lawful age for and on behalf of the defendants and being first duly sworn, deposes and says:

Direct examination.

By Mr. DAVIDGE:

Q. What is your age, residence, and occupation? A. Sixty-three the 6th day of April; I reside at 219 Third street northwest; I am in boiler-work, machine blacksmithing and foundry—carry on a machine shop.

Q. Were you present at the sale in March, 1884, of what was known as the Hitz property, on the northeast corner of G street north and Ninth street west? A. Yes, sir.

Q. Were you alone or did somebody go with you? A. I had some one with me, Mr. James Robbins, the man you were speaking of.

Q. What did you go there for? A. We went there with the purpose of buying that property if it sold to suit us.

Q. What price were you willing to give for the property? A. From $20,000 to $21,000 or $23,000 was our idea.

Q. You did not buy it? A. No, sir.

Q. Why not? A. It sold for more than we were willing to pay for it for our purposes.

Q. What was your purpose? A. To tear down and build on.

Q. Do you recollect what price it brought? A. I do not know exactly, but it went up to $28,000 or $29,000, I believe.

414 Q. How many houses have you built in the city of Washington, you and Mr. Robbins? A. As Pettit, Dripps & Robbins, I suppose we have built a hundred or more—build, bought, and sold.

Q. During how many years? A. Possibly six years; somewhere along there; while we were together; may be a little more, may be a little less.

Q. Did your brother buy a piece of property on G street north in the year 1884? A. In 1880 he bought a piece of property there.

Q. I thought he bought it in 1884? A. 1880.

Q. Did you buy any property on that street? A. Yes, sir; I bought there earlier than that.

Q. Where was the lot that he bought? A. It was on G street between Eleventh and Twelfth streets.

Q. Which side? A. North side, fronting south.

Q. What frontage? A. Twenty feet front and 100 feet deep.

Q. What did he pay for it? A. Paid $2,800 for it.

Q. You were present at the sale? A. Yes, sir.

Q. And you know personally of the sale? A. Yes, sir. He was not at the sale. He sent me there to buy it for him. I bid it up to $2,800 or $2,900; some one raised it to $3,000 and I went away and left it. The man who was selling it came around to the house at night and made a sale of it at $2,800.

415 Q. Were you there? A. Yes sir.

Cross-examination.

By Mr. TOTTEN:

Q. What did you and Robbins intend to do with this property, if you had bought it? A. We intended to sell or rent.

Q. You did not intend to put any manufacturing establishment there? A. No, sir.

Q. Your principal object was to buy, improve, and sell? A. Yes, sir.

Q. Do you remember whether you made an estimate of the buildings on it? A. No; we never made an estimate of the buildings, any more than it might be worth something to tear down. We should have torn down the buildings and put new buildings on it.

Q. When you tear down buildings like those, you do not get any more for the old material than it would cost to take them away, do you? A. No, sir; not much.

SMITH PETTIT.

Subscribed and sworn to before me this 13th day of May, 1893.

ALBERT HARPER, *Examiner.*

JAMES ROBBINS, being produced as a witness of lawful age
416 for and on behalf of the defendants and being first duly sworn, deposes and says:

Direct examination.

By Mr. DAVIDGE:

Q. State your age, residence, and occupation. A. I am fifty-six years old. I reside at 1314 Vermont avenue, in this city, and I am a builder.

Q. Did you accompany Mr. Smith Pettit to the sale of the property that used to be called the Hitz property, at the northeast corner of Ninth street west and G street north, in March, 1884? A. Yes, sir; I did. I do not recollect the precise date, but I recollect the sale.

Q. Who made the sale, who was the auctioneer? A. Mr. Thomas J. Fisher.

Q. What did you go there for? A. Went there for the purpose of buying the property.

Q. Were you able to buy it? A. Yes, sir.

Q. Was Mr. Pettit able to buy it. A. Yes. We were going to buy it together.

Q. What price had you determined to give for the property? A. We had been there previously to that and looked the matter over and we determined that in our estimation the property was not worth more than $20,000. That is my recollection of it.

Q. What did it sell for, do you recollect? A. I do not recollect the precise figure, but it sold for a good deal more than $20,000.

Q. What did you intend to do with the property if you
417 had bought it? A. We were going to pull those old buildings down—remodel them, change them.

Q. Improve it? A. Improve it.

Q. Have you built many houses in this city? A. Myself?

Q. The firm of which you are a member? A. We built about a hundred.

Q. Who compose your firm? A. Myself, Smith, Pettit, and Dripps.

Q. In what time have you built those houses? A. We have built them in about three years all together.

Cross-examination.

By Mr. TOTTEN:

Q. Did you build them to sell? A. Yes, sir.

Q. And you intended to sell these houses if you had gotten this property? A. Yes, sir; sell anything we can get an advance on.

Q. You were buying for speculation? A. Yes, sir.

Q. You said those old buildings were fit for nothing but to tear down and take away? A. Yes, sir.

JAMES ROBBINS.

Subscribed and sworn to before me this 12th day of May, 1893.
ALBERT HARPER, *Examiner.*

418 Adjourned to—

MAY 16, 1893—Tuesday, 2 o'clock p. m.

Met pursuant to adjournment.
Owing to absence of witnesses, further adjourned to—

MAY 20, 1893—Saturday, 1 o'clock p. m.

Met pursuant to adjournment.
Owing to absence of witnesses, further adjourned to—

MAY 24, 1893—Wednesday, 3 o'clock p. m.

Met pursuant to adjournment.
Owing to absence of witnesses, further adjourned to—

MAY 27, 1893—Saturday, 1 c'k p. m.

Adjourned, subject to agreement.

JUNE 20, 1898—Monday, 2 o'clock p. m.

Met pursuant to agreement.
Appearances: Enoch Totten, Esq., solicitor for the complainant; also the examiner; Messrs. Walter D. Davidge & Morgan H. Beach, solicitors for the defendants, one of whom—

RICHARD W. TYLER, deposes and says, being recalled for further direct examination.

By Mr. DAVIDGE:

Q. Captain Tyler, when you were last under examination
419 I inquired of you how this property stood in respect of insurance and taxes at the time of the sale, and your answer was that you could not answer the question then, as you had not expected to be examined. I wish to know if you can now inform me as to the condition of the property in respect of insurance and taxes? A. In answer to that question, I will state that I have here press copy of a letter under date of November 10, 1883, from our firm of Tyler and Rutherford, in which three items of insurance are mentioned—two of one hundred and fifty dollars ($150) and one of one hundred and five dollars ($105). The sale was made in March of the succeeding year. I am unable at this time to state exactly, but I should think about five hundred dollars was due for insurance—from this statement here, of course; I cannot remember about it—and I am taking my book account which was true at the time it was made.

Q. Using that letter, then, as a memorandum to refresh your memory, what, about, was due for insurance? A. About five hundred dollars.

Q. Was any of that insurance paid previous to the sale? A. No.

Q. Now, tell me what taxes were due at the time of sale. A. The taxes due at time of sale, including interest and penalties thereon,

amounted to three thousand nine hundred and sixty dollars and seventy cents ($3,960.70) at the time they were paid.

Q. After the sale you stated an amount of taxes, among other things, to the auditor on or about July 31, 1885, did you not? A. I presume so.

420 Q. Look at that paper now shown you and state what it is. A. It is the report made by me, as receiver, to the auditor of the court.

NOTE.—The report referred to by the witness, being part of the auditor's report filed August 4, 1885, in equity cause No. 6583, docket 19, supreme court of the District of Columbia, already given in evidence by the complainant in this case, is here again given in evidence by the defendants, copy thereof, by consent of counsel, being spread by the examiner upon the record as follows:

In the Supreme Court of the District of Columbia, General Term.

Filed August 4, 1885. R. J. Meigs, Clerk.

B. U. KEYSER, Receiver,
vs.
JOHN HITZ ET AL. } No. 6583, Equity Docket 19.

Report of Receiver.

Agreeably to the decree of July 13th, 1885, the undersigned, receiver in the above entitled cause, submits the following report, to wit:

From the beginning of his term of office as such receiver, December 12, 1883, to the date of the sale of the property in question (all of lot 3 and the west 30 feet of lot 2, in square 405) under the deed of trust of June 18th, 1877, made to secure W. P. Jenks $20,000.00, with interest, &c., and recorded in Liber 857, folio 411, of the land records of the District of Columbia, which sale was duly consummated on the 26th day of March, 1884, the gross proceeds of rents collected from the said		
421	property amounted to the sum of.....	$709.96
	Received from clerk, pursuant to said decree of July 13th, 1885.....	3,863.45
		$4,573.41

Disbursements.

For repairs on property from December 12th, 1883, to March 26, 1884.....	23.78
	23.78
Commissions on $709.96; rents collected at 10 per cent.....	70.96
Taxes from June 30, 1883, to March 26, 1884.....	319.91
" for year ending June 30, 1883, with interest and costs thereon.....	553.05

The same for 1882, with interest and costs thereon				599.53
The same for 1881,	do.	do.	.....	633.71
Do. 1880,	do.	do.	.....	692.25
Do. 1879,	do.	do.	.....	757.61
Do. 1878,	do.	do.	.....	404.64
Commissions, 3 % on $3,863.08			.....	115.90
Total disbursements			.....	$4,171.34

Balance in hands of receiver, $402.07.
Respectfully submitted.

RICHARD W. TYLER, *Receiver.*

To the auditor.
July 31st, 1885.

Q. When were the last taxes paid before the sale? A. The taxes for the year 1877 were the last taxes paid prior to the sale.

Q. Then, from 1877 to 1878 the taxes were unpaid down to the sale? A. Yes.

Q. Now, Captain Tyler, in this connection I would be glad to know when the last interest was paid on the note dated June 18, 1877, secured by the deed of trust prior to the sale? A. September 18th, 1878.

Q. And from that time down to the sale no interest whatever had been paid? A. No, sir.

422 Q. I understand that the property at the corner of 9th and G streets was improved by a building consisting of a ground floor and a floor above. How did the walls of that building extend—not in feet, but did the walls extend all the way up the second story? A. The outside wall did, the interior wall only to the top of the first story.

Q. How were the rooms in the second story divided? A. There was a narrow hall passageway from the south extending through to the north tier of small rooms on both sides, the rooms being ten or twelve feet by twelve or fourteen feet.

Q. And how were those rooms divided? A. By studded partitions plastered.

Q. You had charge of this property as receiver some time before the sale? A. Yes.

Q. Can you give me information about the rent of these rooms in the second story—about how many were there? A. I should think there were twelve or fourteen rooms.

Q. Do you not know how many? A. No.

Q. Well, about what rent did those rooms yield? A. I could not answer that question.

Q. Can you give me no estimate of the rental value of those rooms on the second story? A. From my recollection, I should say from three to five dollars for each room per month; but they were mostly unoccupied, and I think they were rented sometimes to roomers at a lower rate.

423 Q. What were they occupied for when they were occupied? A. One or two of them were occupied as offices.

Q. And the others? A. I cannot tell you; sometimes for roomers—sleeping apartments.

Q. I think you stated in your examination-in-chief that that corner building was very much dilapidated at the time of the sale, did you not? A. Yes.

Q. After the sale of the property did you repair the ground floors of the corner building? A. Yes, sir; I think they all had new floors put in, grade floors, but that was at different times, not immediately after the sale.

Q. How did you find the floors that were there when you made the sale? A. The joists were decayed and gave way and new joists and floors were necessary.

Q. Do you recollect anything being done on the ground floors of the two dwelling-houses immediately east? A. Yes, sir; they were rotten and had to be taken out.

Q. What did you put in there? A. We cleaned out all the grade floors and concreted the floors to grade and put in new Georgia pine floors.

Q. I suppose you made other repairs on the property?. A. Yes, sir.

Mr. DAVIDGE: I will not trouble you with them now.

WITNESS: We put in new ranges and new latrobes.

Q. Captain Tyler, at the time of the sale you knew the late Thomas J. Fisher very well, did you not? A. Yes.

424 Q. How long had you known him? A. Possibly three or four years—maybe more.

Q. At that time you were very familiar yourself with real estate, were you not? You say when the loan was made you were rather new in the business of making loans; but the sale was made, I understand, in March, 1884. By that time were you familiar with public sales? A. Yes.

Q. Now, I would like to know whether you advised with the late Thomas J. Fisher in regard to the sale of this property and the terms of the sale.

Mr. TOTTEN: Objected to as immaterial.

A. Yes; I did.

Mr. TOTTEN: Same objection to the answer.

Q. What did you do in regard to the fixation of the terms of sale in the advertisement under which you offered the property? A. I had a conference with the late Thomas J. Fisher, and I think he prepared the advertisement.

Mr. TOTTEN: I object to the answer and shall move the court to strike it out.

Q. Did he approve the terms of sale as offered? A. Yes.

Mr. TOTTEN: The question and the answer thereto objected to as leading and improper.

Q. Did you discuss with him the terms of sale in respect of selling the property as a whole and selling it for cash? A. Yes.

425 Mr. TOTTEN: Same objection to the question and answer.

Q. What was his judgment about it?

Mr. TOTTEN: Objected to as incompetent.

A. I discussed with him the matter of the terms of sale and we agreed upon the terms, and he prepared the advertisement and acted as auctioneer.

Mr. TOTTEN: Same objection to the answer.

Q. You say you discussed the terms of sale with the late Thomas J. Fisher. I want to know whether you both concurred in selling the property as a whole and selling for cash. A. Yes.

Mr. TOTTEN: Same objection to question and answer.

Q. In 1884 you were very familiar with prices, yourself, in that neighborhood, were you not? A. I do not think there was much property being sold at that time.

Q. I did not ask whether there was much or little property being sold at that time. I asked you whether, as a real-estate man, you were familiar with prices in that neighborhood. A. Yes, sir.

Q. What, in your judgment, was the price obtained at the sale and for which the property was sold?

WITNESS: As to sufficiency?

Mr. DAVIDGE: Yes.

A. Well, I think it was a good price; it sold at a good price—more than I had expected.

Q. I would ask what was the opinion of Mr. Fisher in regard to the price?

426 Mr. TOTTEN: Objected to because immaterial, incompetent, and hearsay.

A. Mr. Fisher said after the property was knocked down that it was a splendid sale and that he had not expected the property to bring that much.

Q. By the report of the auditor, filed August 4, 1885, and given in evidence, you are charged in the accounting with $709.96, rents collected by you from the property, and with the further sum of $3,863.45, received by you from the clerk of the court—in all, $4,573.41—and you are credited with the cost of repairs, taxes, interest, and other things, and also with a balance of $380.04, to be paid W. P. Jenks on account of trust indebtedness, and in that way the amount is balanced. I merely want to ask you whether you accounted to Mr. Jenks for this money, $380.04. A. Yes, sir; I did account to Mr. Jenks for it.

Q. In making this sale of the 26th of March, 1884, did you act upon your own judgment and that of Mr. Thomas J. Fisher, and others, it may be, only, or did you take and act upon the advice of counsel? A. I acted upon the advice of counsel also.

Cross-examination.

By Mr. TOTTEN:

Q. Are you still in possession of this property and collecting the rents for Mr. Jenks? A. Yes—that is, the firm of Tyler and Rutherford is.

Q. Your firm is in possession and collecting the rents of this property? A. Yes.

Q. You are accounting to Mr. Jenks? A. Well, to his estate; Mr. W. P. Jenks is deceased.

427 Q. And you have been so in possession and collecting the rents of the property ever since you made that sale? A. Yes.

RICHARD W. TYLER.

Subscribed and sworn to before me this 20th day of June, 1898.

ALBERT HARPER, *Examiner.*

Adjourned to—

JUNE 21, 1898—Tuesday, 3 o'clock p. m.

Met pursuant to adjournment.

Appearances: Walter D. Davidge, Esq., of solicitors for the defendants, and also the examiner.

Owing to the absence of Morgan H. Beach, Esq., of solicitors for defendants, further adjourned to—

JUNE 22, 1898—Wednesday, 2 o'clock p. m.

Met pursuant to adjournment.

Owing to absence of Morgan H. Beach, Esq., of solicitors for the defendants, further adjourned to—

JUNE 23, 1898—Thursday, 2 o'clock p. m.

Met pursuant to adjournment.

Owing to the absence of Morgan H. Beach, Esq., of solicitors for the defendants, further adjourned to—

428 JUNE 23, 1898—Saturday, 2 o'clock p. m.

Met pursuant to adjournment.

Owing to the absence of witness, further adjourned to—

JUNE 27, 1898—Monday, 2 o'clock p. m.

Met pursuant to adjournment.

Appearances: Messrs. Walter D. Davidge and Morgan H. Beach, solicitors for the defendants, and also the examiner.

Owing to absence of Enoch Totten, Esq., solicitor for the complainant, because of engagement in court, further adjourned to—

JUNE 28, 1898—Tuesday, 2 o'clock p. m.

Met pursuant to adjournment.

Owing to the absence of witness, further adjourned to—

JUNE 29, 1898—Wednesday, 2 o'clock p. m.

Met pursuant to adjournment.

Owing to absence of witness, adjourned to June 30, 1898, Thursday, 3 o'clock p. m.

ALBERT HARPER, *Examiner.*

429 JUNE 30, 1898—Thursday, 3 o'clock p. m.

Met pursuant to adjournment.

Appearances; Enoch Totten, Esq., solicitor for the complainant; Messrs. Walter D. Davidge and Morgan H. Beach, solicitors for the defendants; also the examiner and—

ROBERT O. HOLTZMAN, who, being produced as a witness of lawful age for and on behalf of the defendants and being first duly sworn, deposes and says:

Direct examination.

By Mr. DAVIDGE:

Q. Will you state your name, age, occupation, and residence? A. Robert O. Holtzman; about fifty years of age; real-estate broker, and I reside in Washington, D. C.

Q. How long have you been engaged in the real-estate business? A. Twenty-five years in July.

Q. Where? A. In this city.

Q. In what part of the city have you carried on business for the past fifteen years? A. Always on F street between 9th and 10th streets northwest, in this city. My first office was in the Gonzaga College building.

Q. Your office was in what was known as the Gonzaga College building, on F street? A. Yes, sir. I have been on F street between 9th and 10th streets northwest ever since I have been
430 in business. I have had four offices since I have been in business, and all on F street between 9th and 10th streets.

Q. Where is your present office? A. At the northeast corner of 10th and F streets northwest, in this city.

Q. How long have you been there? A. Since December, 1880.

Q. Are you an owner or lessee of that property? A. I am lessee of the property.

Q. From whom did you lease the property? A. From Cardinal Gibbons.

Q. Representing what institution? A. St. Patrick's church.

Q. What are the dimensions of your property? A. Twenty-four feet ten inches by eighty feet.

Q. When did you lease it? A. June, 1880.

Q. For how long? A. Twenty-five years.

Q. What terms? A. Three hundred dollars a year for the first ten years and five hundred dollars a year for the remaining fifteen years.

Q. How many lots adjoin yours on the east, and what are their dimensions? A. They run from lot thirty-six to lot forty-six, both

inclusive, I think eleven lots, making ten lots besides mine, and they are all twenty feet front by seventy-five feet, excepting mine, which is twenty-four feet ten inches by eighty feet. The other lots do not pay as much ground rent.

431 Q. What do the other lots pay? A. Four hundred dollars a year now for each lot.

Mr. TOTTEN: Who pays four hundred dollars a year?

WITNESS: The lessee of the inside lots.

Mr. TOTTEN: Do you know that of your own knowledge, or did somebody tell you?

WITNESS: I am agent for the property; I made all the leaseholds for the property; I rented or leased the lots for the church and sold some of them. The rental of the lots, excepting mine, was two hundred dollars a year for the first ten years, and for the residue of the term of twenty-five years, four hundred dollars a year.

Q. I think part of the consideration for your lease was that you were to erect a building on the premises costing five thousand dollars. A. All those who built on the lots had to erect buildings costing not less than five thousand dollars, and to revert to the church at the expiration of the leasehold.

Q. Did you have the property in charge as agent? A. Yes.

Q. For the purpose of leasing it for the benefit of the church? A. Yes.

Q. Then the leases you have mentioned were negotiated by you, were they not? A. Yes.

Q. At the time you refer to—that is, 1880—who owned the property immediately east of the church property you have mentioned down to the corner of 9th street—I should have said down to Masonic temple? A. The Jesuits.

432 Q. You mean, I presume, Gonzaga college? A. I mean the property owned by Gonzaga college—the Jesuit fathers.

Q. Referring to the eleven lots and the houses, who first built on those lots? A. I did.

Q. Did you build the tenement you now occupy as your real-estate office? A. Yes.

Q. How long before you were able to negotiate the leases of the other lots? A. About two years.

Q. When was the beginning of the rise in value of the property after 1880? A. I think it took place shortly after all that property was built upon which belonged to St. Patrick's church. That would make it about 1883 or 1884—between 1884 and 1885, I think.

Q. Then the first rise took place? A. That is my impression.

Q. I mean in that square. A. Yes.

Q. At that time you were doing business at the corner of F and 10th streets? A. I commenced to do business there in December, 1880. I moved into the office in December, 1880.

Q. I wish you would give me any instances you can recall of values on F Street property in 1881, 1882, 1883, 1884 which came under your observation in the course of your business.

WITNESS: I do not exactly understand, Mr. Davidge, what you mean.

433 Mr. DAVIDGE: I mean in your square—that is, the square where your place of business is.

WITNESS: You mean instances of rise in values?

Mr. DAVIDGE: Well, you may try it that way.

WITNESS: Instances of values at that time and rise of values since?

Mr. DAVIDGE: I mean instances of values at that time.

A. Well, you take the Gonzaga College property. That could have been bought about that time—that is, before the improvements were made, or about that time when first started—for about two dollars and twenty-five cents a foot on the F Street front.

Q. What time do you refer to—what years—1881, 1882, 1883? A. Well, as far as I can recollect, about 1881, 1882, 1883, along there.

Q. You say you negotiated the leases for the rest of the property? A. I did.

Q. Of the eleven lots? A. Yes.

Q. How long before they were improved? A. Well, they were improved as soon as I negotiated the leases. I commenced to improve mine, but I did not get anybody to take them for two years after I started mine.

Q. How long before they were built upon and improved to a large extent? A. They commenced to improve right away, as fast as I could induce them to lease.

Q. What was the effect upon property generally in the
434 neighborhood of that improvement? A. Well, I think the improvement was the immediate cause of the increase in values of property along F street.

Q. Now, you are going on to tell me the prices of F Street property immediately before the improvement took place. You spoke of the Gonzaga College property—— A. (Interposing.) No; I said after the improvement took place or about that time.

Q. I wish to get at the rise in values of property on F street after the improvement of this property in your square, and I cannot do that until I get the values before that time; had you any acquaintance with the property in the neighborhood of the Sun building on F street? A. Yes; there were the lots on which the Sun building now stands and adjoining on the east.

Q. What was that property held at? A. Some property alongside of the Sun building could have been bought about that time for two dollars and twenty-five cents a foot.

Q. Give me some other instance of property on F street as to its value before the rise took place. A. Well, the building that Thomas J. Fisher & Co. are in, I think Mr. Willard gave about eleven thousand five hundred dollars for that. I tried to get Matthew Galt to buy it. I tried to get Matthew Galt to buy the land next to the Sun building to the east for two dollars and twenty-five cents a foot, but he would not do it.

Mr. TOTTEN: Objected to as immaterial and incompetent.

Q. The office of Thomas J. Fisher & Co. was, I think, on the

south side of F street, about midway between 13th and 14th
435 streets? A. Yes; and it is there now.

Q. I think you said that in your opinion the improvement of these lots you have mentioned between 9th and 10th streets on F street led to a general increase in values of real estate on F street? A. I did.

Q. You have mentioned the Sun building and the adjoining building. What did that property afterwards bring? A. Well, my wife and her sister sold half of the land that the Sun building is on at about eight dollars a square foot.

Q. Do you recollect what year that was? A. The fifteenth of April, 1885.

Q. Well, the increase, beginning as you have mentioned, continued for how long? A. I think it continued up to the time of the commencement of the panic—that is, the last panic.

Q. When did that begin—in 1892? A. 1893.

Q. Give me some idea to what extent prices went up on F street. Do you recollect—— A. (Interposing.) I am trying to think of some sale.

Q. Try to think of the Mertz purchase. A. I forget what was paid per foot for that, because he had to buy a leasehold there which cost nine or ten thousand dollars.

Q. All I desire is the best of your recollection as to increase in prices of property on F street. What was the highest point property reached on F street? A. I will say that my recollection about those matters is not clear enough for me to state, and that
436 there are here in town parties who had something to do with those transactions who can tell you accurately about them.

Q. Did you make no sales yourself on F street? A. Yes. I sold the ground where the principal building of the Boston house now stands for old Dr. Howard to Mrs. Calderon Carlisle.

Q. On F street? A. Yes.

Q. When? A. Before the rise.

Mr. DAVIDGE: What I am striving to get at is whether you sold any property on F street after the rise.

WITNESS: That is just what I am telling you.

Mr. DAVIDGE: You are telling about sales before the rise.

WITNESS: You asked me the other question first, and then I gave some account of sales on F street. I do not know now whether you refer to before or after the rise.

Q. Now I ask you to give me some instances of sales of property on F street after the rise took place. A. I do not think I made any sales of property on F street since the rise until lately.

Q. What do you mean by lately? A. Well, within the last year.

Q. Since the panic? A. Yes.

Q. What was the effect of the panic on prices? A. It does not seem to have had any on F street that I know of so far.

Q. You think that property would bring the same now that it

did when it was at its highest point before the panic? A. If anybody wanted it for a specific purpose.

437 Q. In other words, property on F street is necessary for certain purposes? A. Yes; and seems to be holding its own.

Q. Do you recollect when the Moses building was built? A. I could not tell you the year.

Q. Do you recollect the price of the Moses land? A. No, sir; I could not swear to that. Mr. James E. Fitch, who sold it, can tell you that.

Cross-examination.

By Mr. TOTTEN:

Q. You spoke about at what terms property might be sold or could be sold belonging to Gonzaga college, on F street between 9th and 10th streets? A. Yes.

Q. Has any of that property been sold? A. It was all sold.

Q. All of it sold? A. Yes.

Q. To whom? A. Well, Mr. Thomas E. Waggaman bought a piece.

Q. Do you mean absolutely bought it? A. Yes; the Gonzaga College property was sold and not leased, while the Jesuits sold their property instead of leasing it, and there is where they made a big mistake.

ROBERT O. HOLTZMAN.

Subscribed and sworn to before me this 30th day of June, 1898.

ALBERT HARPER, *Examiner.*

Mr. DAVIDGE: Testimony-in-chief on behalf of the defendants is here closed.

ALBERT HARPER, *Examiner.*

438 *Testimony in Rebuttal.*

Filed August 3, 1898.

In the Supreme Court of the District of Columbia.

JANE C. HITZ
vs.
WILLIAM P. JENKS ET AL. } Equity. No. 12800.

Pursuant to agreement the parties met at the office of Enoch Totten, Esq., 502 E street northwest, Washington, D. C., at 3 o'clock p. m., on Thursday, June 30, 1898, for the purpose of taking testimony on behalf of the complainant in rebuttal.

Present on behalf of the complainant, Mr. Enoch Totten; present on behalf of the defendants, Messrs. Walter D. Davidge and Morgan H. Beach.

HENRY M. DELLINGER, a witness of lawful age, called by and on behalf of the complainant in rebuttal, and having been first duly sworn, is examined—

By Mr. TOTTEN:

Q. How long have you resided in the District of Columbia, in the city of Washington? A. I have been here nearly 60 years; will be in August next.

Q. Do you know anything about the property at the junction of Ninth and G streets northwest, in this city? A. I know the property.

Q. You know the locality? A. Yes, sir.

Q. How long have you been a resident and living about
439 there or having an office there? A. I have been about there since 1857.

Q. Do you own any property in that vicinity? A. Yes, sir.

Mr. DAVIDGE: Objection is here made on behalf of the defendants to any evidence touching the subject of value, as that subject has been fully examined in the case of the complainant-in-chief, and is in no sense rebutting evidence.

By Mr. TOTTEN:

Q. In what property were you interested in that vicinity? A. At one time I owned the northwest corner, where Mr. Dodge now has an office. Mr. Dodge owns it now.

Q. That is opposite and to the west of this lady's property? A. Yes, sir; right opposite.

Q. When did you sell that property, if you did sell it? A. I sold it, I think, in 1866 or 1867; I do not recollect exactly.

Q. Do you remember for what price you sold it? A. Yes, sir; I sold it for $3 a foot.

Q. Have you any interest in the other corner immediately south of that property, at the southwest corner of Ninth and G? A. Yes, sir.

Q. You own that building? A. Yes, sir.

Q. Your property extends along G street several feet, does it not? A. Seventy-one feet.

Q. Can you state when you bought that property? A. Yes, sir; I bought it in 1868.

440 Q. Can you tell us about how much you paid for it? A. Do you mean in a lump sum or how much per foot?

Q. How much per foot, if you can tell us. A. I paid $10,000 for the property, and the lot is 32 feet 8 inches by 71, containing about 2,300 square feet. I don't know exactly the number.

Q. How long have you been acquainted with the property on the northeast corner of Ninth and G street, being the property of Mrs. Hitz in controversy here? A. I recollect when those houses were built, but I can't recollect the year.

Q. Did you have your office on G street, in this same location, in 1884? A. Where I am now?

Q. Yes. A. Yes, sir.

Q. Were you acquainted with Mrs. Hitz' property in 1884? A. Yes, sir.

Q. Please tell me how much you think it was worth in March, 1884. A. I suppose that property ought to have been worth $4.50 or $5 a foot.

Q. In March, 1884? A. Yes, sir.

Cross-examination.

Mr. DAVIDGE:

Not waiving the benefit of the foregoing objection, Mr. Davidge proceeds to cross-examine:

Q. Do you recollect a sale in March, 1884? A. Yes, sir; I recollect when the sale took place. I can't recollect the exact
441 date, but I recollect when the property was sold.

Q. Were you present? A. No, sir; I was not present.

Q. Had you sufficient means at that time to buy? A. To buy this property that was sold?

Q. To buy the Hitz property when it was sold in March, 1884. A. Had I the means?

Q. Yes. A. No, sir; I had no means to buy it.

Q. Since 1868 have you bought any other property in that immediate neighborhood? A. No, sir.

Q. Have you sold any since 1868? A. No, sir; I haven't sold any.

Q. So that you have bought one piece of property and sold one piece of property in that vicinity? A. Yes, sir.

Q. You sold to whom the first property at the northwest corner? A. I sold that to the Christian church, afterward known as the Garfield Christian church, or Vermont Avenue Christian church; I sold that corner lot fronting on Ninth street, north of G, twenty-five feet. They bought those three lots expecting to build a church there, but the church never was built.

Q. Did they buy those lots from you? A. Oh, no; I only owned the corner; they bought the corner from me and the others they bought from Towles, who was the agent for Mr. Fisher, of Philadelphia.

Q. What did they give you for that corner? A. They gave me $3 a foot for the corner.

442 Q. How many feet? A. 2,500.

Q. Twenty-five fronting on Ninth street? A. Yes, sir.

Q. You personally sold it to those parties, who expected to build a church, I think you said? A. I sold it to those parties.

Q. Did they abandon that purpose? A. believe they resold the property; I don't know. I know I got my money.

Q. You sold it to them in 1866 or 1867? A. Yes, sir; I know I bought the other property in 1868, and I know I sold that corner some little time before that.

Q. And then you took the proceeds of that sale, or a large portion of them, and bought property on the opposite side? A. Yes, sir.

Q. Bought from whom? Can you tell me? A. The one I own now?

Q. Yes. A. I bought it from a man by the name of Walker. You recollect Walker, Mr. Davidge, who used to keep an eating-house on Sixth street and Pennsylvania avenue. It was a very tony place at one time, and big men went there—Clay, Webster, and such men.

Q. Can you give me more accurately the date of that purchase? A. I cannot. I have the deed at home, but I don't just recollect.

Q. From whom did you buy it? A. I bought it from
443 Walker, I think. I bought it in the month of May or June. I am not certain about the exact date; I can't carry dates in my head.

Q. The deed will show the consideration? A. Yes, sir; the deed will show, I think.

Q. When you bought, in 1867, all that side of Ninth down to F was all built up, was it not? A. Yes, sir.

Q. There were shops along there? A. No, sir; I was the first party that had a store along there, and Eberly followed. He owns four buildings along there, and then a widow, Mrs. Miller, I think her name was, sold hers to Mr. Galt, who tore out the front part and rebuilt it.

Redirect examination.

By Mr. TOTTEN:

Q. How far above G street, on Ninth, is Mr. Galt's private residence? A. In feet, do you mean?

Q. I mean Mr. Galt, the jeweler. A. I know; but you want to know how far?

Q. Yes. A. It is 300 feet or more; perhaps 400.

By Mr. DAVIDGE:

Q. That is the length of the square. Is that what you are talking about? A. First, there is the corner that I owned, now owned by Mr. Dodge; then some other buildings; then the church. The church is a hundred feet, I reckon, and then comes Grant street, and next is Mr. Galt's. It is somewhere along about 300 feet.

By Mr. TOTTEN:

444 Q. Tell us when that Presbyterian church was built that stands immediately opposite to Mrs. Hitz' property on Ninth street? A. It was built in 1842. I worked on it.

HENRY M. DELLINGER.

Sworn to and subscribed before me this 30th day of June, A. D. 1898.

WM. HERBERT SMITH,
Examiner in Chancery.

LORIN M. SAUNDERS, a witness of lawful age called by and on behalf the complainant in rebuttal, having been first duly sworn, is examined.

Mr. DAVIDGE: The objection is renewed as to the introduction of testimony covered by the case in chief, with respect to values.

By Mr. TOTTEN:

Q. How long have you lived in Washington city? A. I came to this city in the winter of 1864.

Q. You are a member of the bar, I believe, and have been for many years? A. Yes, sir.

Q. How long did you practice law? A. From 1870 to 1881.

Q. In what business did you engaged then? A. In the real-estate business.

Q. How long have you been engaged in that business—ever since? A. Substantially ever since.

445 Q. And you are engaged in that business now? A. Yes, sir; somewhat. The real-estate market is rather dull just now—no market at all now.

Q. Were you acquainted with the property on the northeast corner of Ninth and G streets, in this city, known as the Michael Shanks property, belonging to Mrs. Hitz in 1884? A. Yes, sir.

Q. Were you engaged in the buying and selling of real estate in the year 1884? A. Yes, sir.

Q. To what extent? A. Very extensively.

Q. About what time did the rise in real estate all over the city take place, or, rather, what time did it begin? A. It was in 1881. I think it commenced to quicken a little in 1880, but it started up decisively in 1881.

Q. And continued until a few years ago? A. Yes, sir.

Q. What was the property of Mrs. Hitz's to which I have referred, on the corner of Ninth and G, worth, in your judgment, in March, 1884? A. Now, shall I speak of this as vacant land or as land with buildings on it?

Q. Just as it was, Mr. Saunders. A. By the foot?

Q. Either way or both. You may give it to us both ways if you choose. First, how much was it worth per foot? A. That is including the buildings, you mean?

446 Q. Yes. A. I should say it was worth easily $6 a foot.

Q. What do you say as to that property being desirable and a fine piece of property? A. Ninth street at that time, in 1864, seemed to be of greater promise than most any other of the north-running streets; I remember that very distinctly; that great expectations were had with respect to Ninth street, and prices, I remember, were advancing a little more rapidly on Ninth street than on most any other north-running street, excepting possibly Seventh street, and while I do not remember of having any sales—that is, I haven't consulted my books—I have a general recollection of the fact that Ninth Street property generally was desirable, particularly corner property. Of course, corners have always been considered

of greater distinctive value than intermediate property, and I know that our rule—we have a general rule among ourselves—was that a corner was worth 30 per cent. more than middle or intermediate property.

Mr. DAVIDGE: I object to the witness' statement as to the general rule in regard to the value of corner property.

The WITNESS: It was worth thirty per cent. more by reason of being on a corner.

By Mr. TOTTEN:

Q. Was that a just estimate, in your judgment? A. Yes, sir.

Cross-examination.

By Mr. DAVIDGE:

Q. Were you ever in the houses on the Hitz property? A. I never was through the houses—the two houses in the rear.

Q. Were you ever inside either of the houses? A. I never was.

447 Q. Then you know nothing at all in relation to the interior of these houses? A. Not in regard to the interior; no; I have often seen the exterior of them.

Q. As thousands of others have seen them? A. Very likely.

Q. You have no special information, I understand, in respect either of the interior or exterior of those houses? A. No; I did not say that; I have never been inthe interior of either of those houses, so far as I now remember, unless possibly I have been in the store; but I have had an opportunity to study the exterior for the purpose of estimating their value.

Q. Your exterior observation has been that of any other observer, has it not? A. Yes.

Q. You have had no special opportunity to make a critical examination of either the inside or outside of those houses? A. I have had a slight inclination to examine the exterior. I think Colonel Totten spoke to me about this matter perhaps a year ago, and since then I have looked at the houses possibly with a little more care than I would have done otherwise.

Q. But before that you never had the slightest inducement to make any examination? A. No.

Q. I need hardly ask whether you have examined the interior of the building at the corner with reference to improvements, as I believe you say you have never been inside of that? *Q.* Do you refer to the time since 1884, up to this time, or limited to

448 1884?

Q. Well, I will say before 1884. A. I don't remember that I was ever in it before 1884, but since then I have been in the building often.

Q. What part of the building? A. The corner, the tailor store.

Q. What sort of a store is that? A. It is a one-story store, I think.

Q. What is the business of the man who occupies it? A. It used to be kept by Mr. Simpson, a tailor.

Q. Who occupied it when you went inside? A. Mr. Simpson.

Q. What business did he carry on? A. Tailor.

Q. You went there to buy clothing? A. To buy clothes; yes, sir.

Q. Did the purchase of clothes induce any special examination of the condition of the premises? A. No; I don't think so, except I remember the character of the building. I think it was a one-story building. I wouldn't like to say how it was *it* 1884.

Q. The only observation you indulged in was general in character, such as any one would use in going to a tailor shop to buy clothes? A. Yes, sir; my observation of the buildings was such as to cause me to think that it was of ordinary construction, but the back buildings were of better construction. One of the buildings in front was a one-story and I think extended back nearly a hundred feet; those buildings were occupied by different people at different times for different uses; there was nothing extraordinary about the construction.

449 Q. From your standing point, was not the construction extraordinarily mean? A. I would not like to say it was extraordinarily mean; it was that character of one-story building such as you will find generally in the city.

A. One-story buildings on a street like Ninth street? A. Yes.

Q. You were speaking of your observation before 1884. From that time have you ever had occasion to make any more particular observation of that one-story building on the corner? A. No, sir; except as I would be passing that corner.

Q. In passing the corner you would not see much of the inside, would you? A. It is hardly necessary to go inside of a house of that character to form a pretty accurate idea as to what it is.

Q. Well, now, are you right there? A. Yes.

Q. Can you state the character of the inside of the house from your observation of the outside? A. Not as to a dwelling-house, but it is very easy as to a store.

Q. The outside of that is exceeding mean, is it not? A. I would not like to say a man's property is mean. I would say that it may be a sort of temporary construction, perhaps, or, as I said before, very much of the character of one-story stores upon valuable property, as that is.

Q. Is it pressed brick? A. No, sir; I believe not. I do not believe there is much brick in the corner. I think it is more

450 of a frame house.

Q. What kind of bricks are in it; are they pressed? A. I cannot say.

Q. What is your best recollection? A. I should say they are ordinary bricks, painted, according to my recollection.

Q. If you had to give an opinion as to the quality or character of the bricks, would you or not say they were pressed? A. No; I would not give any opinion as to whether they were hand-made,

whether they were red bricks, or whether they were salmon bricks or patent bricks.

Q. They do not usually paint pressed bricks, do they? A. Yes; they are often painted..

Q. Where buildings are put up for temporary purposes—and you say this was a temporary concern—it is usual to use pressed bricks? A. Well, I would not say. I don't think the question of bricks entered very largely into this matter—I mean to say in regard to this one building. I don't believe there are a great many bricks in the corner.

Q. So, in your judgment, it is not of very much importance whether they are pressed or salmon or what they are; that is your opinion about it? A. I refer, Mr. Davidge, to the fact that there are but few bricks entering into the construction of the corner building. That is what I mean to say. Therefore the question of whether they are pressed bricks or hard bricks or whether they are salmon bricks, I say, don't cut any very great figure. That is what I say about it.

Q. Did you ever purchase any property in that neighbor-
451 hood? A. I have purchased property.

Q. I mean within a radius of a couple of squares? A. That is about two squares—on G street.

Q. Is that the only piece of property you ever purchased in that neighborhood? A. That is the only piece I purchased on G street, but I have purchased on Eleventh street, near that vicinity; three pieces on Eleventh and F, and some between F and G, on Eleventh, and I don't remember how many others. Four pieces within a radius of a couple of squares.

Q. The property on Eleventh street would hardly be within a radius of two squares; it would be at the limit of that radius. A. Possibly at the limit. This was on Eleventh street.

Q. Did you ever sell any property in that neighborhood? A. Well, I sold those pieces that I refer to; all but one piece.

Q. Then you have bought and sold in that neighborhood? A. Yes, sir.

Q. Except those to which you have referred, have you bought and sold any other? A. I can't remember, except as I refresh myself from the office books.

Q. Colonel Totten spoke to you about this matter a year ago, and you had the curiosity to look at the buildings—not in any very special way, to be sure—but has it not occurred to you to refresh your memory by reference to your books? A. I have not done it, or if I did it has escaped my memory now. Since he summoned me here this time I have not looked at my books. I will
452 say, in passing, that from 1881 to 1885 I had two thousand pieces of property on my books, embracing every locality in the District of Columbia, but how near it was to the corner of Ninth and G streets, outside of this that I bought and sold myself, I would not like to state.

Mr. DAVIDGE: This testimony is objected to on the ground that it has no relation to the subject-matter of inquiry.

Q. I do not want you to testify here as to possibilities or speculations. I want you to testify as to facts, so far as your memory serves you. The only instances of purchases and sales are those you have mentioned—two lots on G street—— A. There were three on Eleventh street and one on G.

Q. When did you buy the one lot on G? A. That was in the eighties. I think about 1887 or 1888.

Q. That was a long time after 1884? A. Yes.

Q. When did you buy the three lots on Eleventh street? A. The one I bought first on Eleventh was, I think, very near 1884 or 1885—not over that. I am speaking now according to my best recollection, Mr. Davidge.

Q. You have no certainty, though, about that? A. I am certain that it was not beyond 1884 or 1885.

Q. But have you any certainty as to how far within that time it might have been? A. I would be willing to state it was not later than 1885.

Q. I understand you are willing to state that it was not later than 1885; but how much earlier was it? A. It was between 1884, say—not later than 1885.

453

Q. Do you think that is certain? A. Yes.

Q. That was the first piece that you bought on Eleventh street? A. Yes.

Q. When did you buy the other two pieces? A. The other property was later.

Q. About how much later? Please give me your best recollection. A. That was 1888 or 1889.

Q. I understand that the three purchases (two on Eleventh street and one on G street) were made in the year 1888 or 1889. A. The first one was along about 1884 or 1885; the others were, I should say, 1888; and the last one, on G street, I should say was about 1889.

Q. You cannot be accurate as to time now? A. I can be reasonably accurate, but I would not pretend to be exactly accurate without consulting my books and paper, deeds, &c. I have had so much of that sort of thing to attend to.

Q. Where was that lot on G street? A. That is on the corner of Twelfth—near the corner of Twelfth.

Q. That is three squares from this property? A. Yes.

Q. On which side? A. It is on the north side of G.

Q. Was that a corner lot? A. No, sir.

454

Q. That has not this advantage of a thirty per cent. more value, then? A. No.

Q. Was it west or east of Twelfth? A. It was west of Twelfth.

Redirect examination.

By Mr. TOTTEN:

Q. How much did that cost? A. Thirteen dollars a foot.

Q. Did all that property on Eleventh and G cost thirteen dollars a foot? A. That on Eleventh street was earlier, and I guess cost less.

By Mr. DAVIDGE:

Q. What did that cost? You might as well state it. A. It was a small lot, I think 17 by 50, and cost me $6,000 at that time.
Q. How much a foot? A. You can figure that for yourself.

By Mr. TOTTEN:

Q. About how much? A. It was middle ground.
Q. You have figured it up and know about how much it was per foot. How much did the ground on Eleventh street average per foot, about which you have been telling us? A. I bought three pieces there; none of it was on a corner; it was all middle ground. I think it was about seven or eight dollars a foot; something like that.
Q. You spoke about the long building on Ninth street, on the property in question, being a one-story building. Are you
455 not mistaken about that? A. It is a very low building, and I had put it down as a one-story building.
Q. You might be mistaken about that? A. Certainly I might. I would not consider, from my recollection, that it was a very tall building for a two-story building, if it was a two-story building.

L. M. SAUNDERS.

Subscribed and sworn to before me this 30th day of June, A. D. 1898.

WM. HERBERT SMITH,
Examiner in Chancery.

HENRY M. DELLINGER recalled and further examined in rebuttal on behalf of the complainant.

By Mr. TOTTEN:

Q. Mr. Dellinger, what kind of a building is that on this property in question, running up Ninth street? A. It is what you might call an ordinary building; it is a two-story building; it has been occupied. I did some work there myself.

By Mr. DAVIDGE:

Q. The upper story is very low, is it not? A. It is about ten feet, I think, as I recollect. They rent it out in rooms to different parties.

HENRY M. DELLINGER.

Subscribed and sworn to before me this 30th day of June, A. D. 1898.

WM. HERBERT SMITH,
Examiner in Chancery.

456 Adjourned to meet at 12 o'clock noon tomorrow, July 1, 1898, at 1424 Ninth street northwest, Washington, D. C.

WASHINGTON, D. C., *July* 1, 1898.

Met pursuant to adjournment.

Present on behalf of the complainant, Mr. Totten; present on behalf of the defendants, Mr. Davidge and Mr. Beach.

WILLIAM FORSYTH, a witness of lawful age, called by and on behalf of the complainant in rebuttal, having been first duly sworn, is examined—

By Mr. TOTTEN:

Q. Mr. Forsyth, will you tell us how old you are? A. I will be 78 the ninth day of next August.

Q. How long have you lived in Washington? A. I have been living in Washington since 1850.

Q. What is your business? A. I have been surveyor of the city, and surveyor of the District of Columbia, and commissioner of public buildings.

Q. How long have you been purs-ing the profession of surveyor in the city of Washington? A. All that time; from 1850 until less than a year ago, when I quit.

Q. Are you familiar with the squares bounded by G and Tenth and F and H streets northwest, the Gonzaga property, for instance, and the property that the church stands on? A. Yes, sir;
457 Grant street runs through that square.

Q. Mr. Forsyth, do you remember a stream of water which in former times passed through the square between G and H and Ninth and Tenth down towards F? If so, I wish you would tell us where it started in that square, in which direction it ran, and where it went to. A. About one hundred feet, more or less, from the corner of Ninth street the old water-course crossed G street, then ran diagonally in a northwesterly direction until it struck Tenth street at Grant place.

Q. Was there a stream running towards the south in this square? A. There was. All the drainage of those houses along the line of that water-course emptied into it.

Q. Where did that stream cross G street? A. About a hundred feet from Ninth.

Q. What kind of a stream was that in 1850? A. When freshets came it was fil-ed up with mud and stuff that washed in until it was converted into a sewer. It was about six feet wide.

Q. What was it you said about freshets? A. When freshets came it filled up with mud and stuff, and that is one of the reasons why they converted it into a sewer.

Q. Before the sewer was built what was the condition of the stream during the prevalence of freshets? A. All I have to say about that is this: It carried all the water from the rear of all these houses on Tenth street back to Dr. Butler's church and back to the tan yard at New York avenue and Thirteenth streets.

Q. Was it a pretty strong and vigorous stream? A. There
458 would be a very little water in it, only what came from houses along its line.

Q. Where did it pass through the square bounded by F and G and Ninth and Tenth, the square containing the Gonzaga college and the Masonic temple? A. At Gonzaga college it may have been about sixty or seventy feet up from the line of Ninth street or Masonic hall, and it ran zigzaging until it went over to G street; from that it took a northwesterly direction until it intersected at Grant place, then it ran back to Dr. Butler's church and in that square to the tan yard at Thirteenth and New York avenue, and the spring in Franklin square.

Q. What has become of that stream now? A. It is just the same as it was then.

Q. It is arched over? A. It is arched over.

Q. It passed through that square where Gonzaga hall was? A. Yes, sir.

Q. And does it run under the Masonic temple? A. I cannot say about that. There is a trap on both sides of the street there, showing where the sewer is.

Q. Did you make a diagram showing the course of this stream? A. I made the one shown me.

Q. Is that map substantially correct? A. It is.

Q. Showing the distances, locations, and all that? A. Yes, sir; as near as I could make it.

Said map or diagram is offered in evidence by Mr. Totten, and the same is filed herewith, marked Exhibit William Forsyth No. 1.

459 Cross-examination.

By Mr. DAVIDGE:

Q. Mr. Forsyth, I understand the stream you have been talking about is an ancient water-course? A. Certainly.

Q. Where did it rise? A. In Franklin square.

Q. And ran southerly, and at Grant street it took a course that you describe as southeast? A. As described on this map (Exhibit William Forsyth No. 1).

Q. I desire now to call your attention to the course of the stream through the square bounded by Ninth and Tenth and G and H; when was that stream arched over in that square? I think you said in 1860? A. That was arched over some time about 1860. I think it was.

Q. And about the same time it was arched over G street? A. That was arched over before, from those two points (indicating) across the street.

Q. About the same time? A. About the same time.

Q. Now, we come to the square south of G, square 376; tell me when that part of the stream was arched over. A. It was arched over all at the same time.

Q. We did the arching—the corporation of Washington—I suppose? A. It was let out to the highest bidder.

460 Q. I do not mean to say that the corporation of Washington actually did the work, but it was done under an ordi-

nance of the corporation of Washington. A. It was done under a corporation ordinance and I was the surveyor, and it was done under my direction.

Q. This stream crosses F street? A. Yes, sir.

Q. And it runs near the building of B. H. Warner & Co., does it not? A. Yes, sir.

Q. And then it runs down and crosses E, does it not? A. Certainly; it crosses E and crosses Pennsylvania avenue into the old canal.

Q. And it crosses Pennsylvania avenue under or very near the immense wrought-iron building, as it used to be called, does it not? A. That is right.

Q. Then for all these years that natural water-course has been arched over and converted into a sewer? A. That is just what is the matter.

Q. And the adjacent property all drains into that water-course? A. Yes, sir.

Q. You are not in office now? A. No, sir.

Q. When did you retire? A. I retired about six or eight months ago.

WM. FORSYTH.

Sworn and subscribed to before me this 1st day of July, A. D. 1898.

WM. HERBERT SMITH,
Examiner in Chancery.

461 MATTHEW G. EMERY, a witness of lawful age, called by and on behalf of the complainant in rebuttal, having been first duly sworn, is examined—

By Mr. TOTTEN:

Q. Mr. Emery, what is your present occupation? A. I am a banker.

Q. You are president of the Second national bank? A. Yes, sir.

Q. How long have you resided in Washington? A. Since 1842.

Q. Are you acquainted with the property on the northeast corner of Ninth and G streets, known as the Michael Shanks property, which used to be owned by Jane C. Hitz? A. I know the property.

Q. How long have you been acquainted with that property? A. I did the stone-work for Shanks when he built two houses on that property, fronting on G street.

Q. You did the stone-work for the two houses fronting on G street, did you? A. Yes, sir.

Q. Of what character is that work? Is it good work? A. Yes, sir.

Q. What, in your judgment, was the value of those buildings in March, 1884?

Mr. DAVIDGE: This subject has already undergone examination in the complainant's case-in-chief, and I object to the question as not calling for rebutting evidence.

A. You mean the two houses?

Mr. TOTTEN: Yes. A. Well, from $12,000 to $15,000. I do not remember their condition in 1884.

462 Q. Can you tell us about when they were built?

By Mr. DAVIDGE:

Q. Do you mean $12,000 to $15,000 for both? A. Yes.

By Mr. TOTTEN:

Q. Can you tell us about what year they were built? A. In the forties somewhere—1846, maybe.

Q. Are you acquainted with the building on Ninth street which runs up Ninth street from the corner of G? A. I know the property.

Q. You did not do any work on that property, did you? A. I think not.

Q. Are you acquainted with the values of property in the city of Washington? A. Ordinarily so, I think.

Q. Were you acquainted with the value of that property as early as 1884—all of it? A. Oh, yes.

Q. What, in your judgment, was that whole property, both on Ninth and G streets, worth in March, 1864? A. Tell me the number of feet.

Q. A little over 8,100 feet.

Mr. DAVIDGE: All this is objected to.

A. About $60,000. I do not know the cost of the Ninth Street buildings; I never examined them particularly. They are two-story small affairs, I know, but I think the ground is worth $5 a foot, anyhow.

Q. You think the whole thing together is worth about $60,000? A. I think so.

463 Cross-examination.

By Mr. DAVIDGE:

Q. Mr. Emery, you think the ground is worth, I understand you, $5 a foot? A. I think so.

Q. Do you think that the buildings are of any special value in the sale of the ground at that corner, if you bought the property? A. I cannot speak as to the front buildings on Ninth street, but the other two buildings were very nicely built.

Q. But was the property suited for residences, or was it not rather better suited for some large office building, in March, 1884? A. I should think in 1884 the houses were in fair condition. I do not remember what condition the Ninth Street property was in in 1884, though it was inhabited or occupied, I remember.

Q. I want to know whether a corner of that street could be purchased and made most available by means of residences, or whether it would be better for business and office purposes. A. The Ninth Street property would be nice business property.

Q. And also for stores and offices? A. Yes.

Q. You speak of the land as being worth about $5 a foot. Did you ever, about March, 1884, buy or sell any property in that neighborhood? A. I don't know that I did.

Q. Did you within ten years of March, 1894? A. I don't believe I ever did in that vicinity.

464 Q. Can you recall any circumstance that ever induced you especially to examine the property with a view to ascertaining its value? A. I cannot. I merely gave you my judgment as to its value at that time in 1884. It was worth as much in 1884 as it is today.

Q. And worth a good deal more in 1884 than it is today, was it not? A. I think the Ninth Street property on that corner was worth as much for business purposes as it ever was.

Q. Did not property go very high in value from 1882 to 1892? A. It may have done so.

Q. You do not recollect it? A. No.

Q. Was not the price of property most wonderfully advanced on that street between 1882 and 1883? Do you recollect that? A. Some of it trebled in value.

Q. That condition does not exist now, does it? A. No; it has gone back one-third in value, on an average.

Q. Some years after the rise in F Street values was there not also a rise on G street? Do you recollect that? A. All that property in that vicinity rose; not so rapidly in proportion as on F street, but it rose some.

Q. But it all rose in price som-time after the rise on F street; several years after? A. Yes.

M. G. EMERY.

Subscribed and sworn to before me this 1st day of July,
465 A. D. 1898.

WM. HERBERT SMITH,
Examiner in Chancery.

(Here follows Exhibit Wm. Forsyth No. 1, marked p. 466.)

467 *Decree Dismissing Bill with Costs, &c.*

Filed November 28, 1899.

In the Supreme Court of the District of Columbia.

JANE C. HITZ, Complainant,
vs.
JOHN STORY JENKS ET AL., Defendants. } In Equity. No. 12800.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it is, this 28th day of November, 1899, ordered, adjudged, and decreed that the complainant's bill be, and the same is hereby, dismissed with costs to be taxed by the clerk.

OLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

From this decree the complainant appeals to the Court of Appeals of the District of Columbia, which appeal is allowed, and the penalty of the appeal bond for costs is fixed at two hundred and fifty dollars.

CHAS. C. COLE,
Asso. Justice.

Waiver of Citation.

Filed December 7, 1899.

In the Supreme Court of the District of Columbia.

JANE C. HITZ, Complainant,
vs.
JOHN STORY JENKS ET AL., Defendants. } Equity. No. 12800.

468 Citation on the appeal of the complainant in the above-entitled cause is hereby waived.

W. D. DAVIDGE,
Sol'r for Defendants.

Memorandum.

December 8.—Appeal bond filed.

469 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 468, inclusive, to be a true and correct transcript of the record (as prescribed by rule 5 of the Court of Appeals of the District of Columbia) in cause No. 12800, equity, wherein Jane C. Hitz is complainant and John Story Jenks *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, the 8th day of January, A. D. 1900.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 960. Jane C. Hitz, appellant, *vs.* John Story Jenks *et al.* Court of Appeals, District of Columbia. Filed Jan. 15, 1900. Robert Willett, clerk.

In the Court of Appeals of the District of Columbia.

JANE C. HITZ, Appellant,
vs.
JOHN STORY JENKS ET AL. } No. 960.

1

EXHIBIT "B."

Filed Jan. 10, 1879.

Secured by deed of trust.

$10,000. WASHINGTON, D. C., *Jan. 5th*, 1876.

One year after date I promise to pay to the order of E. P. Halstead, trustee, ten thousand $_{100}$ dollars, value received, with interest until paid at ten (10) per cent. per annum, payable semi-annually; payable at the German-American savings bank.

WM. R. CHIPLEY.

Residence or place of business: Lock box 9, P. O.

(Endorsed.)

W. R. Chipley. 570.
Jan. 5–8, '78.
10,000.
E. P. Halstead, trustee.
Payment guaranteed. S. L. Crane.
July 20, '76. Int., 500.00, paid to July 5, '76.
Jan. 29, '77. " 500.00, " " Jan. 5, '77.
Apr. 30, '77. " 500.00, " " July 5, '77.
M'ch 3, '78. " 500 " " Jan. 5, '78.
June 6, '78. " 419.44, " " June 6, '78.

2

"EXHIBIT C."

Filed Jan. 10, 1879.

Secured by deed of trust.

$10,000. WASHINGTON, D. C., *Jan. 5th*, 1876.

Two years after date I promise to pay to the order of E. P. Halstead, trustee, ten thousand $_{100}$ dollars, value received, with interest until paid at ten (10) per cent. per annum, payable semi-annually; payable at the German-American savings bank.

WM. R. CHIPLEY.

Residence or place of business: Lock box 9, P. O.

(Endorsed.)

W. R. Chipley. 570.
Jan. 8, '78.
10,000.
E. P. Halstead, trustee.
Payment guaranteed. S. L. Crane.

July	20, '76.	Int.,	500.00,	paid to	July	5, '76.
Jan.	29, '77.	"	500.00,	"	" Jan.	5, '77.
Apr.	30, '77.	"	500.00,	"	" July	5, '77.
March	3, '78.	"	500.00,	"	" Jan.	5, '78.
June	22, '78.	"	472.22,	"	" June	22, '78.

3 *Subpœna to Answer.*

Issued Jan'y 10, 1879.

In the Supreme Court of the District of Columbia, the 10 Day of January, 1879.

BEN. U. KEYSER, Complainant, *against* JOHN HITZ ET AL., Defendants. } No. 6583, Eq'y Dock. 19.

The President of the United States to Richard W. Tyler, John Hitz and Jane C., his wife; Eminel P. Halstead, Robert B. Donaldson, Charles E. Prentiss, Wm. R. Chipley, Sarah L. Crane, N. P. Jenks, defendant-:

You are hereby commanded to appear in this court at its first special term, occurring twenty days after service of this subpœna, and answer the exigency of the bill this day filed and entitled as above, under pain of attachment and such other process of contempt as the court shall award.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR., *Ass't Clerk.*

MEMORANDUM.—That the defendant- herewith served *is* to enter *his* appearance in this suit in the clerk's office on or before the day at which this writ is returnable; otherwise the bill may be taken for confessed.

Marshal's Return.

Sum'd & served notice of injunction on Richard W. Tyler,
4 and sum'd John Hitz & Jane C. Hitz, E. P. Halstead, Robert B. Donaldson, Charles E. Prentiss, Sarah L. Crane, and not to be found, William R. Chipley, January 13th, 1879.

F. DOUGLASS, *Marshal.*

Restraining Order.

The defendant is hereby restrained, as prayed in the within-mentioned bill, until further order, to be made, if at all, after a hearing, which is fixed for the 18th day of Jan'y, 1879, of which take notice.

By the court:

MACARTHUR, *Justice.*

Attest: —— ——, *Clerk, &c.*,
By —— ——, *Ass't Clerk, &c.*

5 *Replication.*

Filed Jan. 25, 1879.

In the Sup. Ct. of the D. C.

KEYSER, Receiver, *vs.* HITZ ET AL. } 6583, Eq. Doc. 19.

The complainant hereby joins issue upon the answers of the defendants Tyler and Jenks.

ELLIOT,
For Complainant.

Separate Answer of Robert B. Donaldson.

Filed Jan. 25, 1879.

In the Supreme Court of the District of Columbia, the 18th Day of January, 1879.

BENJM. U. KEYSER, Receiver, *vs.* JOHN HITZ ET ALS. } Equity. No. 6583.

The separate answer of the defendant Robert B. Donaldson respectfully represents:

1st & 2d. That he admits the residence of the parties hereto, and that the complainant has been appointed receiver of the German-American National Bank of the City of Washington.

6 3d. He admits the execution of the deed set forth in the third paragraph of said bill, but leaves the legal effect thereof to be decided by the court.

4th & 5th. In answer to the statements of the fourth and fifth paragraphs of said bill, this defendant says that he had no knowledge of the fact that he was named as trustee in the above-named deed and did not know of the existence of said deed until the time of the execution of the release referred to in said paragraphs; that he executed said release under the following circumstances: His co-defendant Prentiss informed him that he was trustee under the deed

(at which this defendant expressed his surprise), and informed him that he, as cashier of the bank, was the holder of the notes secured by said deed, and that they had been paid. This defendant further enquired whether it was proper for him to sign said deed, and was assured that it was "all right, the money was in the bank;" whereupon he & the defendant Prentiss executed and acknowledged the release; and the defendant Halstead, as payee of the notes, and Prentiss, as the holder of the same, also signed said deed; that he had no other or further knowledge of the transaction respecting said deed of trust, notes, & release than that herein set forth, and he denies all charges of fraud, collusion, conspiracy, or deceit, and avers that he in good faith executed the said release on the statement of Prentiss that the notes were paid and only when the said Prentiss and the payee of the note signed said release with him. As to the other averments of said paragraphs four and five, he requires strict proof, in so far as he may be affected thereby.

7 6th to 13th. As to the remainder of said bill, this defendant says that he has no personal knowledge of the matters and things therein set forth, and he is advised that they are not material for him to answer, but if they should be held to be material as to him he demands full proof thereof. This defendant denies all and every the charges of fraud made against him in said bill, and denies that the complainant has any claim, legal or equitable, against him by reason of the transactions referred to in his said bill of complaint; and, having thus answered as he has been advised, he prays to be hence dismissed.

R. B. DONALDSON.

I do solemnly swear that I have read the answer by me above subscribed, and that the statements therein made as of my own knowledge are true, and those made on information and belief I believe to be true.

R. B. DONALDSON.

Sworn and subscribed to before me this 18th day of January, A. D. 1879.

JOHN T. C. CLARK,
[SEAL.] *Notary Public.*

8 *Appearance.*

Supreme Court of the District of Columbia.

Elliott.

B. U. KEYSER, Receiver,
vs.
JOHN HITZ ET AL. } 6583.

Feb'y 4, 1879.—Enter my appearance for C. E. Prentiss, 5; Sarah L. Crane, 7; E. P. Halstead, 3.

R. D. MUSSEY.

Appearance as ordered entered by the clerk.

Appearance.

Supreme Court of the District of Columbia.

6.

KEYSER, Receiver,
—
HITZ ET AL. } 6583.

Enter my appearance for Jno. Hitz & Jane C. Hitz.

W. S. COX, *Sol'r.*

Appearance as ordered entered by the clerk, Feb'y 5, '79.

9 Copy.

Undertaking of Compl't.

In the Supreme Court of the District of Columbia, the 1st Day of March, A. D. 1879.

KEYSER, Receiver,
vs.
TYLER ET AL. } No. —, Eq. Doc.

The plaintiff hereby undertakes to make good to the defendants all damages by them jointly or severally sustained by reason of the plaintiff's having wrongfully and inequitably sued out the writ of injunction or the restraining order heretofore issued in this cause, and stipulates hereby that the said damages may be ascertained in such manner as the justice shall direct, and that on dissolving the injunction he may give judgment thereon against the plaintiff for said damages in the decree itself dissolving the injunction.

B. U. KEYSER, *Receiver.*

Filed March 4, 1879.

10 *Separate Answer of E. P. Halstead.*

Filed May 26, 1879.

In the Supreme Court of the District of Columbia, the 23 Day of May, 1879. In Equity.

B. U. KEYSER, Rec'd, etc.,
vs.
JOHN HITZ ET AL. } 6583, Eq. Dock. 19.

For answer to said bill of complaint or so much thereof as he is advised that it is necessary or material for him to answer, Eminel P. Halstead, impleaded herein as Emanuel P. Halstead, says:

1st. I have no personal knowledge of the several matters and things in said bill alleged, except that as E. P. Halstead, trustee, I made an accommodation endorsement of the said Chipley notes,

which said notes on information and belief I aver to have been fully paid, satisfied, and discharged so far as the said bank is concerned by the money advanced or loaned by the said W. P. Jenks.

And I demand strict proof of the allegations that they are now held by the said plaintiff as assets of said bank, and that he has any right, title, or interest in or to them, and that they have any legal and valid existence.

2d. I deny all charges of fraud, collusion, combination, or conspiracy in so far as they relate to me, and upon information and belief in so far as they relate to my codefendants.

And having fully answered, &c.

EMINEL P. HALSTEAD.

11 Subscribed and sworn to before me, at Washington city, D. C., this 23d day of May, A. D. 1879.

CHRISTOPHER EDIE,
[SEAL.] *Notary Public.*

Separate Answer of Charles E. Prentiss.

Filed Jun- 6, 1879.

In the Supreme Court of the District of Columbia, the — Day of ——, 1879. In Equity.

B. U. KEYSER, Rec'd, vs. JOHN HITZ ET AL. } # 6583, Eq. Dock. 19.

For answer to said bill of complaint, reserving and saving unto myself, &c., I say:

1st & 2d. I am content to admit the allegations of the 1st and 2d paragraphs of said bill.

3d. I admit the execution of the deed referred to in the 3d paragraph of the bill.

I do not admit the legal inference as to the effect of such deed charged in the said paragraph.

4th. I admit that the German-American savings bank received said notes and made a loan upon them and the security of the real estate so conveyed in trust, as recited in the 3d paragraph of the bill, of $20,000.

12 But I deny that the said German-American national bank as the successor of said Germ. Am. sav. bank "held the same for value as aforesaid" until November 1st, 1878, or that they are assets of said bank or property in said receiver's possession and control, &c.

On the contrary, I aver that they have been paid and discharged in so far as said bank is concerned, and that they are not assets of said bank, and that they are improperly in the possession of said receiver.

5th. I deny as wholly false and wanton and unfounded the charges of fraud made in the 5th paragraph of said bill in so far

as they relate to me, and make a similar denial of them on information and belief in so far as they relate to my codefendants.

I deny that the release referred to was unauthorized or irregular, and I do not admit the legal inferences charged in said paragraph.

I admit the execution of said release, *Exhibit D.*

6th. I admit the execution of the conveyance of said property by my codefendants John and Jane C. Hitz to Miss Crane, *Exhibit E*, but deny on information and belief all charges made in paragraph 6 of said bill of fraud, &c., on the part of the parties thereto in said transaction.

7th. I admit the execution by Miss Crane of the deed of trust to R. W. Tyler, charged in the 7th paragraph of the bill, *Exhibit F*, and the making and delivery of the said note by Miss Crane and the loan of the money by the said N. P. Jenks.

But I deny all charges of fraud in said transaction in so
13 far as they may relate to me, and on information and belief in so far as they relate to my codefendants or any of them. I deny that the money loaned by the said Jenks was "loaned to the said Sarah L. Crane for the sole use and benefit of the defendants Hitz," and, on the contrary, aver that said transaction, in which Miss Crane was solely a vehicle of title, was one for the sole use and benefit of the said German-American national bank, which received every cent of the money so advanced by the said Jenks.

8th. I admit the execution by Miss Crane of the deed set up in paragraph 8 of said bill; but I aver that the recitals in said deed were induced, as was the transfer of said equity of redemption, by the claims and demands and misrepresentations of the said plaintiff as to his ownership or possession of the said Chipley notes, which at the time of the failure of said bank and the said plaintiff's appointment as receiver were not the property of the said bank nor among its assets; and I aver that when said conveyance of her equity of redemption in said property was so made to the plaintiff upon his demand therefor and upon his statement that he held said Chipley notes as assets of said bank, it was upon the express understanding upon his part that said notes were *not* secured by said deed of trust executed by said Mr. and Mrs. Hitz to Dr. R. B. Donaldson and myself as trustees, and that the said equity of redemption in said property was all thereof to which the said bank had any claim as security for the payment of said notes.

9th, 10th, 11th, 12th. I deny any and all charges of fraud in the said release by Dr. Donaldson and myself to the said defendants
14 Hitz, made in the 9th, 10th, 11th, & 12th paragraphs of said bill in so far as they relate to myself, and on information and belief in so far as they relate to my codefendants.

So far as the statements of fact in said 9th, 10th, 11th, and 12th paragraphs may affect me, I demand strict proof of them.

As to the legal propositions stated in said paragraphs, I am advised that it is not necessary for me to answer them in detail; but I do not admit, by this omission, their correctness.

And having fully answered, &c.

C. E. PRENTISS.

The several matters and things stated in the foregoing answer on personal knowledge are true; those stated on information and belief I believe to be true.

C. E. PRENTISS.

Subscribed and sworn to before me, at Washington city, D. C., this 3 day of June, A. D. 1879.

R. J. MEIGS, *Clerk.*
By M. A. CLANCY, *Ass't Clerk.*

15 *Separate Answer of Sarah L. Crane.*

Filed Jun- 6, 1879.

In the Supreme Court of the District of Columbia, the — Day of ——, 1879. In Equity.

B. U. KEYSER, Receiver,
vs.
JOHN HITZ ET AL. } # 6583, Eq. Dock. # 19.

For answer to said bill of complaint or so much thereof as I am advised that it is necessary or material for me to answer, I say:

1st & 2d. I am content to admit the allegations of the 1st and 2d paragraphs of the bill.

3d. I am content to admit the statements of fact in the 3d paragraph of the bill, and am not advised as to the correctness of the legal inferences drawn from them.

4th. I am content to admit the delivery of the notes referred to in the 4th paragraph of the bill to the said bank, &c., and that said bank loaned the money on them, but to whom I do not know.

But I deny on information and belief that the said bank held the said notes for value until the 1st of November, A. D. 1878, and I believe and so charge that this statement is wholly false and untrue, and that the books of said bank, now and when the plaintiff filed his said bill, in said plaintiff's possession, demonstrate the incorrectness of said statement.

16 I further charge on information and belief that the said plaintiff's holding of said notes is wholly unauthorized and without warrant of any law whatever, and that he obtained them by false representations.

5th. I deny on information and belief that there was any fraud, irregularity, or the like in the release referred to in the 5th paragraph of said bill or the transaction of which it was the evidence, and I deny the soundness of the legal inferences drawn in said paragraph from the erroneous statements made in it.

6th, 7th, 8th. I do not admit the allegations of the 6th, 7th, & 8th paragraphs of the bill, as made in said bill, but denying as utterly false the various charges of fraud, &c., so lavishly made in them in so far as they relate to myself, and charging on information and belief that they are equally false and unfounded in so far as

they relate to my codefendants or any of them, I proceed to state the facts of the transactions referred to in said paragraphs:

On or about the 16th of June, 1877, the defendants Jane C. and John Hitz executed to me the deed to the said property on 9th and G Sts. N. W. referred to, and on or about the 18th of June, 1877, I executed the note and the deed of trust securing it to the said N. P. Jenks referred to. I understand the transaction to be one for the benefit of the said German-American national bank, which received all the money loaned by the said N. P. Jenks on said note so secured, and that I was acting as the vehicle of title therein, for I had and received no other consideration therefor than my desire to accommodate said bank, in which my relatives and friends were largely interested.

17 On information and belief I charge that the said Chipley notes were paid and satisfied, so far as the said bank was concerned, and that the books of said bank show this.

I made the deed of November 12th, 1878, to the plaintiff which is annexed to said bill under the following circumstances, viz: After the failure or suspension of said bank and the appointment of the plaintiff as receiver thereof, he claimed that the said Chipley notes were in his possession as assets of the said bank, and I was informed or reminded that the equity of redemption in said 9th and G Street property was vested in me. I was further informed that the plaintiff desired me to transfer it to him. Believing his representations as to his possession of said notes to be correct, I endorsed on the back of each of said Chipley notes, which notes, so far as I can now recall, I then saw or heard of for the first time, the words "*Payment guaranteed, S. L. Crane,*" and executed the deed referred to, the form of which, as I was advised, and the recitals of which were suggested by the said plaintiff. I had no personal knowledge on the subject, but adopted the plaintiff's language and statements as correct. Upon information and belief since acquired I deny the plaintiff's statements and repudiate the plaintiff's language so, as aforesaid, embodied in said recitals of said deed.

9th, 10th, 11th, 12th. I am advised that there is nothing for me to answer in the 9th, 10th, 11th, and 12th paragraphs of said bill. I therefore neither admit nor deny the several allegations made in them, but in so far as they may affect me demand strict proof thereof.

And having fully answered, &c.

S. L. CRANE.

18 Subscribed and sworn to, at Washington city, D. C., this 3d day of June, 1879, by Sarah L. Crane, who says that the several matters and things herein stated as of her own knowledge are true; and those stated on information and belief she believes to be true, before me—

[SEAL.] R. J. MEIGS, *Clerk*,
By M. A. CLANCY, *Ass't Clerk*.

R. D. MUSSEY,
Solicitor & of Counsel for Sarah L. Crane.

Cross-bill of Sarah L. Crane.

Filed Jun- 6, 1879.

In the Supreme Court of the District of Columbia, the — Day of ——, 1879. In Equity.

SARAH L. CRANE
vs. } 6583. Eq. Dock. 19.
B. U. KEYSER, Receiver, &c.

Cross-bill for cancellation of guarantee, reconveyance, account, and injunction.

By leave of the court first had and obtained, Sarah L. Crane, one of the defendants to the original bill filed herein, files this her cross-bill against Benjamin U. Keyser, receiver of the German-American national bank, &c., the plaintiff in said original
19 bill, and referring to said original bill and to her answer thereto, she complains as follows:

1st. She is a resident of the District of Columbia and brings this suit in her own right.

The defendant Benjamin U. Keyser is a resident of the District of Columbia and is sued as the receiver of the German-American National Bank of Washington City, D. C., appointed, &c., as set out by him in his said original bill.

2d. On or about January 26th, A. D. 1876, the German-American Savings Bank of Washington, D. C., of which, as stated in said original bill, the said German-American national bank is the successor, loaned $20,000 upon two promissory notes for $10,000 each, dated on or about January 5th, A. D. 1876, drawn by Wm. R. Chipley in favor of E. P. Halstead, trustee, secured by a deed of trust executed by John Hitz and Jane C. Hitz, his wife, conveying, in trust, &c., to R. B. Donaldson and C. E. Prentiss lot 3 and part of lot 2, in square # 405, Washington city, D. C., one of which said promissory notes was for one year and the other for two years and both of which bore interest at the rate of 10% *per ann.*, payable semi-annually.

3d. On or about June 18th, 1877, the said property having been released by said trustees, the aforesaid John and Jane C. Hitz conveyed the same unto the plaintiff herein, who thereupon conveyed the same, in trust, to Richard W. Tyler to secure the payment of a promissory note drawn by the plaintiff herein in favor of Jno. Hitz for the sum of $20,000, payable in three years from date, with in-
terest at the rate of 8 per cent. per annum, and by said
20 Hitz endorsed to N. P. Jenks, who advanced or loaned thereon the sum of $20,000. As stated in her answer to the original bill, the plaintiff understood this transaction to be one for the benefit of said national bank, which received the money so advanced by the said Jenks, and that she was merely a vehicle of title therein.

4th. After the failure of said German-Am. nat. bank and the

appointment of defendant as the receiver thereof he in some way got possession of the aforesaid Chipley notes, which had been fully paid and satisfied and discharged, so far as the said bank was concerned, and claimed that he held them as assets of said bank; and so representing them, he demanded that the plaintiff should convey to him the equity of redemption in said property so, as aforesaid, conveyed to her by the said John and Jane C. Hitz.

5th. Misled by these representations of the defendant, the plaintiff herein executed a certain deed on or about the 12th of November, A. D. 1878, which is appended to the original bill as *Exhibit F*, and which is hereby referred to and hereof made a part, after having first endorsed on the back of each of said Chipley notes the words "*Payment guaranteed, S. L. Crane,*" which said Chipley notes, so far as she can recall, she heard of for the first time after the failure of said bank and in connection with said defendant's aforesaid demand. The recitals in said deed and the form of said deed were, as the plaintiff understood at the time, based upon and in conformity to his representations, and all statements therein that the said Chipley notes were assets of the bank, &c., were the defendant's, the plaintiff having no knowledge of her own upon the
21 subject and relying wholly upon his statements and representations.

6th. By said deed she conveyed to the said defendant the rents, issues, and profits of said property, and he has collected and enjoyed them from that time to the present, receiving a large amount of money; but how much she does not know.

7th. The plaintiff refrains from charging that the defendant's said representations as to the Chipley notes being assets of the said bank were fraudulent and made for the purpose of entrapping her into admissions in the recitals of said deed upon which he could base charges of fraud in said original bill herein against her and her codefendants.

But she is advised that, whether said representations were the result of such a desire and purpose or merely of ignorance of the facts, she is in either event entitled to the interposition of a court of equity to relieve her from the consequences of her mistaken action based on such representations.

She is further advised that she is entitled to have her guarantee on said notes and her conveyance of said property made for the benefit of and to the said defendant upon his misrepresentations, as aforesaid, and without any consideration, either good or valuable, passing from him to her, cancelled, set aside, and voided.

She is further advised that the defendant, having so, as aforesaid, obtained large sums of money for rents, &c., of said property, should account to her for the same.

22 She is further advised that the legal title to said property having been vested in her by the said John and Jane C. Hitz, without any consideration therefor passing from her to them or either of them, as the defendant has himself sworn in his said bill, he is chargeable with the notice of the trust in which she held such

legal title, and that she had no right to convey to him nor he to receive said equity of redemption.

She is further advised that she is entitled, as well finally as pending this suit, to have the said defendant enjoined from disposing of said Chipley notes and the property so conveyed to him by her, and from collecting or receiving any more of the rents, profits, and issues thereof, and that pending this suit this court, by its receiver duly appointed therefor, take possession of said property and administer the same for the benefit of the person or persons who shall eventually be decreed to be entitled thereto.

Prayer.

She therefore prays as follows, waiving an answer under oath, viz:

1st. That the said Benjamin U. Keyser be made a party defendant hereto, and that by process of this court duly issued, &c., he be summoned to appear and answer, &c., the exigency of this bill.

2d. That the said Chipley notes be produced here in court, and her guarantee upon them erased and cancelled.

3d. That her said deed of November 12th, A. D. 1878, be cancelled and voided and held for naught, and the legal title by
23 said deed purported to be conveyed to the said defendant be revested in her.

4th. That the said defendant disclose how much money or other valuable consideration he has received from the rents, &c., of said property and be directed to account for the same to her.

5th. That as well finally as pending this suit he be enjoined from in anywise disposing of, charging, or encumbering said Chipley notes or the said property by her aforesaid deed to him conveyed, and from collecting or receiving any of the rents, issues, and profits of said property.

6th. That by its receiver duly appointed this court take possession of said property and administer the same for the benefit of the person or persons who shall be eventually decreed to be entitled thereto.

7th. For such further and other relief as, the premises considered, may be deemed meet and equitable.

S. L. CRANE.

The defendant hereto is Benjamin U. Keyser, receiver, &c.

R. D. MUSSEY,
Solicitor & of Counsel.

Jurat.

I have carefully read the foregoing bill by me subscribed and the same is true according to the best of my knowledge, information, and belief.

S. L. CRANE.

Subscribed and sworn to before me, at Washington city
24 D. C., this 3d day of June, A. D. 1879.

R. J. MEIGS, *Clerk*,
By M. A. CLANCY, *Ass't Clerk.*

Replication to Answer of Def'ts Halstead, Prentiss, and Crane.

Filed Jun- 11, 1879.

In the Supreme Court of the D. C.

B. U. KEYSER, Receiver, &c.,
vs.
JOHN HITZ ET ALS. } 6583, Eq. Doc. 19.

The complainant hereby joins issue upon the respective answers of the defendants Halstead, Prentiss, and Crane.

R. K. ELLIOT,
For Complainant.

25 *Separate Answer of John Hitz.*

Filed Jul- 1, 1879.

In the Supreme Court of the District of Columbia, Holding a Special Term for Equity Business.

BENJAMIN U. KEYSER, Receiver,
vs.
JOHN HITZ and JANE C. HITZ ET AL. } In Equity. No. 6583.

To the supreme court of the District of Columbia, holding a special term in equity:

The separate answer of John Hitz to the bill of complaint in the above-entitled cause exhibited respectfully represents:

First. That he admits that complainant is the receiver of the German-American national bank, as alleged in said bill.

Second. That the several defendants have their residences in the places and are sued in the manner and form as alleged.

Third. That it is true that this defendant, with Jane C. Hitz, did convey unto Donaldson and Prentiss the property described in said bill in trust to secure the payment of the notes particularly mentioned in manner and form described and set out in the said bill, but he knows nothing about such deed, except as the same appears of record among the said records of the District of Columbia.

26 *Fourth.* This respondent has no knowledge at this time as to how the said promissory notes were endorsed or by whom they were endorsed, but he denies that the said notes have become the assets and property of the German-American national bank in manner and form as set forth in the said bill, and he requires that

strict proof shall be made of the said allegation, and, if the said notes are in possession of said plaintiff, demands that proof shall be made as to the manner in which and at what time he became so possessed of the same; and he further denies that the said notes were drawn, endorsed, and discounted by either said German-American savings bank or the German-American national bank for the use of the defendants Hitz or either of them or solely for their accommodation, and he avers that it is not true, as is alleged in said bill, that the amount of the said notes in cash was received by the said defendants, Hitz, or either of them or by any one for their use or benefit or for the use or benefit of either of them; and further answering, he denies upon the best information at his disposal that at the time that said plaintiff was appointed receiver of the said bank the notes were held by the said bank and so passed into his custody as such receiver, and that the same are now held by him, overdue and unpaid, and he requires that with respect to such allegations strict proof shall be made.

Fifth. This respondent denies the several allegations contained and set forth in the fifth paragraph of the said bill of complaint in so far as they charge fraud and conspiracy on the part of the said defendants, John and Jane C. Hitz, or intent to cheat and defraud the said German-American national bank, as alleged in said
27 bill; that this respondent believes that the deed was made, in manner and form as set forth in the said bill, about the sixteenth (16th) day of June, 1877, and avers that said deed was made in good faith and for a proper purpose, and denies that the said deed is in violation of the rights of the said bank or the creditors thereof, as is alleged in the said bill.

Sixth. This respondent does not remember the exact date when the promissory notes mentioned in the sixth paragraph in said bill were made, or the deed therein described was executed, but he denies that the said deed or the notes were made with any intention to cheat and defraud the said bank, as in the said bill is alleged; that it is not true that the said deed was made and placed on record by the defendants Hitz or either of them to enable them or either of them to negotiate the same in the name of another for the use of the said defendants Hitz exclusively, and this respondent requires that strict proof shall be made of the several allegations.

Seventh. This respondent, further answering, says that he believes it to be true that the defendant Crane did, on or about the 18th day of June, 1877, execute a deed of trust to the defendant Tyler, as set forth in the said seventh paragraph of said bill, but he denies that in making such deed of trust Crane combined with the defendants Hitz with purpose to defraud, but, to the contrary thereof, avers and charges that the money realized under the said deed of trust, in manner and form as alleged and set forth in said bill, was ob-
tained for the benefit of the said German-American national
28 bank and was, as far as this respondent was informed and believes, paid to the said bank; that by such payment the said promissory notes made by said Chipley and hereinbefore referred to were fully paid and satisfied.

Eighth. This respondent, further answering, says that he knows nothing of the deed made by the defendant Crane on the 12th day November, 1878, to the plaintiff, but says that the recital in the said deed particularly referred to in the bill, to the effect that certain notes, meaning thereby the Chipley notes, were still due and unpaid and were in the hands of the said plaintiff as assets of the said bank, is not true; that this respondent verily believes that said recital was not properly understood at the time that said deed was executed.

Ninth. This respondent knows nothing of the several allegations contained in the ninth paragraph of said bill.

Tenth. This respondent, further answering, says that he knows the value of the property described in the tenth paragraph of the said bill and verily believes that it is ample as security for the debt to secure which said property was conveyed by the defendant Crane to defendant Tyler; that as to the other allegations in the said tenth paragraph contained he knows nothing.

Eleventh. It is not true that, notwithstanding the release made by Donaldson and Prentiss, the plaintiff is entitled to priority in the payment of the said notes secured by the deed so released, but respondent again avers and charges that the said notes have been fully paid and satisfied, and this he is able and ready to prove to the satisfaction of the court; and, further answering the
29 eleventh paragraph of said bill, defendant submits the several matters and any and all rights which he may have therein to the court.

Twelfth. Defendant denies the several allegations contained in the twelfth paragraph of the said bill, and avers and charges that the same are wholly without foundation in fact.

Thirteenth. And, having fully answered, the defendant prays that he may be hence dismissed with his reasonable costs; and, as in duty bound, he will ever pray, &c.

JOHN HITZ.

I do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

JOHN HITZ.

Subscribed and sworn to before me this 30th day of June, 1879.

[SEAL.] MILTON C. BARNARD,
Notary Public.

30 *Replication.*

Filed Sep. 8, 1879.

In the Supreme Court of the District of Columbia, Holding a Special Term.

B. U. KEYSER, Receiver, &c., *vs.* JOHN HITZ ET AL. } 6583. Eq. Doc. 19.

The complainant joins issue upon the answers of the defendants Robert B. Donaldson, John Hitz, and Jane C. Hitz.

ELLIOT & ROBINSON,
For Complainant.

Answer of Keyser to Cross-bill of Crane.

Filed Sep. 18, 1879.

In the Supreme Court of the District of Columbia, Holding a Special Term.

SARAH L. CRANE *vs.* B. U. KEYSER. } No. 6583. Eq. Doc. —.

This defendant, to so much of said cross-bill as he is advised it is material for him to answer, for answer says:

That he never made any misrepresentations, or even any
31 representations, to this plaintiff in respect to the deed executed by her to this defendant on or about the 12th day of November, A. D. 1878, and which is filed with the original bill in this cause as Exhibit G, & not as Exhibit F, as is inaccurately stated in said cross-bill.

This defendant reiterates the statements made in the affidavit filed in this cause Feb. 8th, 1879, to wit, that on or about the 2d day of November, A. D. 1878, he, as receiver aforesaid, called upon Charles E. Prentiss, one of the defendants to the said original bill, for a transfer of all the real estate of the said Prentiss, & upon that occasion the said Prentiss stated to this defendant that the deed of trust made to secure the Chipley notes had been mislaid, & the said Prentiss then & there proposed that this plaintiff should execute a new instrument of the kind, & inquired whether it should be made to the trustees named in the original deed of trust or to this defendant as receiver. This defendant having expressed a preference to have it made to himself, the said Prentiss said he would see Mr. R. D. Mussey and have it so executed. The said Prentiss was the person who communicated with the said Crane upon this subject, & he it was who brought to this defendant the deed so executed by her, as aforesaid.

This defendant repeats that since the filing of the orginal bill in this cause he has re-examined the books of the German-American

National Bank of Washington, & that the said books show that the notes described in the original bill, bearing date the 5th day of January, 1876, and drawn by one William R. Chipley, never have been paid; that said notes have been continuously in possession of the said bank, as part of its assets, since they were first discounted shortly after their date, & that the loan represented by said
32 notes, numbered 570 on said books, appears due & unpaid.

This defendant again avers upon information & belief, & so charges, that the proceeds of said notes, viz., $20,000, drawn from the funds of the bank, were applied directly to the use & benefit of John & Jane C. Hitz, defendants to the original bill, or one of them. This defendant repeats that no portion of the loan secured by deed of trust to R. W. Tyler was applied to the payment of the notes in question; and this defendant avers upon information and belief, and so believing charges, that the sum of $20,000, so secured, was received by the said John or Jane C. Hitz or one of them; but that at all events the said loan, numbered 570, remains & since its date has ever remained without any credit thereon (excepting interest) whatsoever.

This defendant is advised & insists that the plaintiff has no right to claim that the indebtedness of the president of the bank has been discharged; for the officers of the bank charged with the duty of keeping & superintending its accounts, if the fact were that the indebtedness had been discharged, should have preserved evidence of the fact in a regular & proper way, whereas there is in bank no such evidence, but, on the contrary, cogent evidence the other way. This defendant further expresses his surprise that notwithstanding the affidavit aforesaid filed herein Feb. 8th, 1879, Mr. R. D. Mussey should have filed a cross-bill, charging misrepresentation to & improper influence over the plaintiff Crane in procuring the deed filed as Exhibit G, as aforesaid, when, as this defendant was informed & believed & still believes, the said deed was drawn & prepared
33 by the said R. D. Mussey himself, who had ample opportunity to advise & instruct his client, and who could & should have known that from whomsoever he and she received their instructions and advice, it was not from this defendant.

And this defendant now expressly repeats and reaffirms the said affidavit filed herein on Feb. 8th, 1879, and expressly denies everything in the cross-bill inconsistent therewith; and he insists that the said cross-bill be dismissed, with his reasonable costs in this behalf sustained.

ELLIOT & ROBINSON,
Solicitors for Defendant.

The defendant B. U. Keyser makes oath and says that the matters of fact herein alleged, so far as they are matters within his own knowledge, are true, & so far as they are matters of information & belief, he believes them to be true.

[SEAL.] JAMES H. GRIDLEY,
Notary Public.

Washington, D. C., September 17, 1879.

34 *Separate Answer of Wm. R. Chipley.*

Filed Sep. 20, 1879.

In the Supreme Court of the District of Columbia, Holding a Special Term.

B. U. KEYSER, Receiver, &c., *vs.* JOHN HITZ, JANE C. HITZ, ET AL. } 6583. Eq. Doc. 19.

The separate answer of William R. Chipley, one of the defendants, to the bill of complaint in the above-entitled cause.

This defendant, in answer to so much of said bill as he is advised it is material for him to answer, says:

That he is a resident of the District of Columbia, as stated in the second paragraph of said bill; that he did, as stated in the third paragraph of said bill, sign two promissory notes, of which the two annexed to the bill in this cause & marked respectively Exhibits "B" & "C" he believes to be copies; that he signed the same at the instance of one Beresford, who brought them to him and asked him to sign them, saying that his doing so was a mere form. This defendant does not undertake to say whether the notes were fully written out or were merely in blank form at the time he signed them, but he believes the latter to have been the case. He did not then know & does not now know the defendant Halstead; to his certain knowledge he had never then seen him, & to his certain knowledge he never has seen said Halstead to this day, nor
35 would he know him if he were to see him. He did not then know & does not now know the defendants Hitz or either of them; to his certain knowledge he has never to this day seen either of them and would not know either if he were to see either. He did not, at the time he so signed the said notes, as aforesaid, receive, nor has he ever since received, any consideration whatever for so doing, nor has any one ever called on him to pay either, nor by any possibility could he pay either, nor could he ever have done so. This defendant further says that the memorandum at the foot of said notes & under his name, to wit, "Residence or place of business, lock-box 9, P. O.," was not placed there by himself; that his residence is not in lock-box 9 & never was, & he never said so, & that he never owned lock-box 9, nor any other lock-box.

And this defendant, having no personal or other knowledge of the several matters & things in the other paragraphs of said bill alleged, & having fully answered, &c.

WM. R. CHIPLEY.

Subscribed & sworn to before me this 20 day of September, A. D. 1879.

R. J. MEIGS, *Cl'k.*
By R. J. MEIGS, JR., *Ass't.*

36 *Replication to Answer of Wm. R. Chipley.*

Filed Sep. 20, 1879.

In the Supreme Court of the District of Columbia, Holding a Special Term.

B. U. KEYSER, Receiver, &c., *vs.* JOHN HITZ, JANE C. HITZ, ET AL. } 6583. Eq. Doc. —.

The plaintiff joins issue with the defendant William R. Chipley upon his answer in the above-entitled cause.

ELLIOT & ROBINSON,
For Plaintiff.

Order Granting Leave to Defendant Jane C. Hitz to File Cross-bill.

Filed Oct. 21, 1879.

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver, &c., *vs.* JOHN HITZ, JANE C. HITZ, and Others. } Equity. No. 6583.

On motion of Enoch Totten, Esq, solicitor of the defend-
37 ant Jane C. Hitz, it is, this 21st day of October, 1879, *ordered* that the said defendant, Jane C. Hitz, be, and she is hereby, granted leave to file a cross-bill in this cause.

By the court:

MACARTHUR, *Justice.*

Cross-bill of Jane C. Hitz.

Filed Oct. 21, 1879.

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver, &c., *vs.* JOHN HITZ, JANE C. HITZ, ET AL. } Equity. No. 6583.

The cross-bill of the defendant Jane C. Hitz respectfully shows as follows, to wit:

First. That the original bill of complaint in this cause was filed by the complainant, Benjamin U. Keyser, on the 10th day of January, 1879, against John Hitz and this defendant and Eminel P. Halstead, Robert B. Donaldson, Charles E. Prentiss, William R. Chipley, Sarah L. Crane, W. P. Jenks, and Richard W. Tyler, and that all the parties to the said cause have filed their answers thereto.

Second. She further states that she is advised by counsel
38 and believes that the principal object of the said bill is to reinstate a certain alleged deed of trust bearing date on the 26th day of January, 1876, purporting to have been made by the defendant John Hitz and this defendant to the defendants Robert B. Donaldson and Charles E. Prentiss, the same having been released by a deed of release bearing date on or about the 16th of June, 1877, mentioned in the said proceedings.

Third. She was the only child of Michael Shanks, late of the District of Columbia, now deceased, and his sole heir-at-law. The said Michael Shanks died intestate on the 20 day of May, 1864, leaving Catherine N. Shanks widow and this defendant, his only child; that said Catherine Shanks departed this life on the 26 day of January, 1879, at the city of Washington. The said Michael Shanks at the time of his decease was seized and possessed of a large estate, both real and personal, and that amongst other property he was seized in his own right and in absolute fee of the property mentioned and described in the bill of complaint and known and distinguished as all of lot numbered three (3) and the west thirty (30) feet by a depth of eighty-seven (87) feet of lot numbered two (2), in square numbered four hundred and five (405), being improved property on the corner of Ninth and G streets, in the city of Washington, of the value of about $40,000.00.

Fourth. Some time in the year 1872 the defendant John Hitz (who is her husband, to whom she was married on the 5 day of Aug., 1856), together with the defendant Prentiss and others, organized and set in operation a bank in the city of Washington known as the German-American savings bank, which was subse-
39 quently converted, as she is informed and believes, into what has recently been known as the German-American national bank; that the said John Hitz was president of both of the said banks, and that said Prentiss was cashier thereof; that some time in the year 1875 or 1876 the financial affairs of the said bank became embarrassed, and it became important, to the credit of said bank, that money should be procured for the purpose of relieving its distress; and thereupon, as she believes, and so believing charges, a fraudulent combination and conspiracy was made by and between the said John Hitz, the said Charles E. Prentiss, and other persons to this defendant unknown to procure from her a conveyance of her said separate property located on the corner of Ninth and G streets, as aforesaid, without any consideration; that in pursuance of the said fraudulent combination the deed of trust mentioned in the said bill of complaint, bearing date on the 26th day of January, 1876, was procured, and this defendant was fraudulently induced by the said parties in said fraudulent combination to sign and acknowledge the same by fraudulently concealing the nature of the said deed from her. In this connection she refers to and adopts the averments contained in her answer to the original bill in this cause. She further says that the nature and character of the said conveyance *was* never explained to her at the time of such fraudulent execution or before, and that she never understood that she was mak-

ing any conveyance of any property belonging to her separate estate; and she further avers that she never was aware of the existence upon the land records of the District of Columbia or otherwise of the said deed until after the failure of the said German-American national bank; and she charges that the said deed of trust purports to have been made to secure two promissory notes signed by one Chipley, dated January 5th, 1876, and made payable to the order of E. P. Halstead, trustee, and she is informed and believes and charges that not only the said Chipley, but the said Halstead, were mere "men of straw" in the transaction and were acting in the interest of the said bank and said conspirators and had no interest whatever in the matter, unless it was for the purpose of gaining favors from the said bank, and she also charges that they were engaged in the conspiracy to cheat this defendant, or were used with their consent for the purpose of consummating such conspiracy. She also charges that said notes, so far as said Chipley and said Halstead are concerned, were a subterfuge and a fraud. She further avers that she never received any consideration whatsoever for the transfer of her title to the said real estate, and that she never has to this day received any consideration whatsoever. She is advised by counsel and believes, and, so believing, charges, that the said deed of trust is fraudulent and void as to her, and that it ought to be so declared and set aside.

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Fifth. Afterwards and some time about the 15th day of June, 1877, as she is informed and believes, another deed was made purporting to convey the said property to one Sarah L. Crane, and that the said deed appears to have been signed and acknowledged by this defendant and by her husband, John Hitz, as aforesaid, and she has reason to and does believe, and thereupon charges, that the said deed last mentioned was in continuation of and for the purpose of carrying out the original scheme and conspiracy hereinbefore mentioned to defraud her of her separate estate without any consideration; that at the time of the making of the last-mentioned deed to the said Sarah L. Crane a deed of release (as mentioned in the bill of complaint) was procured to be signed by the said Donaldson and the said Prentiss of the deed of trust hereinbefore mentioned, but she says that she never knew of the existence of the said release until after the failure of the said bank; that the same was never delivered to her or to anybody for her, and that the same was put on record without her knowledge or consent. She further says that at the time of the making of the said release and of the said deed to Sarah L. Crane a deed of trust, as she is informed and believes, was executed by the said Sarah L. Crane to the defendant R. W. Tyler, purporting to be made to secure the payment of a certain promissory note bearing date on the 18th day of June, 1877, for the sum of $20,000.00, which said promissory note was signed by Sarah L. Crane, and was made payable to the order of the said John Hitz for the purpose of fraudulently concealing the nature of said transaction, and was by him endorsed to the order of the defendant W. P. Jenks, of Philadelphia, which deed was recorded on the 20th day of June, 1877. She further charges

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that the said deed of release, the conveyance in fee of the said property by this defendant and her said husband to Sarah L. Crane, and the deed of trust made by the said Sarah L. Crane to the said R. W. Tyler were all a part of and constituted one and the same transaction; that the said three deeds were put upon record at the same time, and that she is advised and believes that they are all and each of them fraudulent as to this defendant, and that they ought to be so declared by this court and annulled and set aside; and she further avers that she never received any consideration whatsoever for the alleged conveyance of the said property to Sarah L. Crane, and that the said three deeds herein last before mentioned were made and procured in pursuance and in consummation of the aforesaid combination and conspiracy for the purpose of cheating and defrauding her out of her separate estate. She also avers upon information and belief that the said Sarah L. Crane never received any consideration whatsoever for the execution of the said deed of trust to R. W. Tyler, and that the said Sarah L. Crane was used for the fraudulent purpose of concealing the true character of the transaction, and that the said deed was never even delivered to the said Sarah L. Crane or to anybody for her. She further charges that the said defendants, William P. Jenks and Richard W. Tyler, had sufficient notice, actual and constructive, to put them and each of them upon inquiry as to the said conspiracy and the fraudulent character of the said conveyances and transactions at the time thereof, and that said Tyler was the agent of the said Jenks therein. She further avers upon information and belief that the money advanced by the defendant Jenks upon the said note was paid over to the said defendant, Prentiss, to be used for the purposes of said bank or of the defendants John Hitz and Charles E. Prentiss, and that no part of it was ever paid to the defendant Crane.

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Sixth. She further says that the acknowledgment of the deed of trust bearing date January 26, 1876, to Donaldson and Prentiss, and the acknowledgment of the deed from this defendant to the said Sarah L. Crane, hereinbefore mentioned, appear to have been taken before one S. F. Austin. At the time when these acknowledgments purport to have been made the said S. F. Austin was the assistant cashier of the said German-American national bank, and that he was either cognizant of the said combination and conspiracy to cheat this defendant out of her separate estate or that he was used for that purpose by those who were in the conspiracy, and that the said Austin never explained to her the character of either of the said papers before taking either of the said acknowledgments, and that she was in entire ignorance of the contents of the said papers. If she had been made aware of the character of either of the said papers she never would have signed them or either of them; that she never had prior to that time conveyed any of her separate estate, and was unwilling so to do. She further charges that the said notary, S. F. Austin, purposely and fraudulently omitted to explain to her the nature and character of the said deeds.

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Seventh. She further says that the said German-American national bank on or about the 31st of October, 1878, closed its doors and was afterwards declared insolvent, and that its affairs are now being wound up by the said Benjamin U. Keyser, as receiver thereof; that after the appointment of the said Benjamin U. Keyser and on or about the 11th day of November, 1878, the said Sarah L. Crane executed, acknowledged, and delivered to the complainant, Benjamin U. Keyser, a deed, whereby she undertook to convey to him any equity which she might have in the said property by virtue of the said conveyance to her of June 16, 1877, from this defendant; and she says, further, that since the last-mentioned deed the said Benjamin U. Keyser has unlawfully, as she is advised and
44 believes, taken possession of the said property, and that he is collecting, and has for a long time been collecting, the rents thereof, and that he has large sums of money in his hands so collected which this defendant, as she is advised by counsel and believes, is entitled to recover.

Eighth. This defendant says that she inherited from her said father about $117,000.00 of personal property and somewhere about $180,000.00 in real estate situated in the District of Columbia; that since the death of her said father, Michael Shanks, she has spent a large portion of her time travelling in Europe, and that she left the said property in charge of her husband, and that she finds now upon an examination that he has lost by mismanagement and otherwise very nearly all of her said personal property, and that he has procured her in addition to the property in question in this case to make a conveyance for his benefit of very valuable property situated on Pennsylvania avenue, and that for his own protection induced her to convey all the realty standing in his name, a large portion whereof had been purchased by him with her separate funds and the title thereto was taken in his own name.

Ninth. She further says that on the 9th day of December, 1878, and soon after the failure of the said German-American national bank, this defendant and the said John Hitz joined in a conveyance whereby they conveyed in due form of law to William G. Metzerott and Samuel Cross, in trust for her separate and sole use, all the real estate which had been inherited by her, as aforesaid, remaining at that time unconveyed; that the said deed was duly signed and acknowledged and was by her recorded on the 17th day of May, 1879, in Liber 913, page 437; that the said deed
45 was made and delivered in consideration of the large sum of money which the said John Hitz had lost belonging to her separate estate, and also in consideration of her joining him in a conveyance of real estate standing in his name to the said Benjamin U. Keyser in order to secure the payment of such debts as might be found due from the said John Hitz to the said German-American national bank; and in further consideration of the conveyance of her absolute fee in certain property of the value of about $15,000.00 known as the *New York restaurant*, situated on Pennsylvania avenue, to satisfy in part certain creditors of the said John Hitz.

Prayers.

And she therefore prays as follows:

1. That she may have leave to file this cross-bill, and that a writ of subpœna may be issued to each of the above-named parties to this cause, requiring them to answer the exigencies of this cross-bill.

2. That the said deed of trust purporting to have been made by her to Robert B. Donaldson and Charles E. Prentiss, bearing date on the 26th day of January, 1876, and the said conveyance bearing date on the 16th day of June, 1877, from this defendant and John Hitz, her husband, to Sarah L. Crane, may be declared fraudulent and void as to the rights and interests of this defendant, and that they may be set aside.

3. That the deed of trust made by the said Sarah L. Crane to the said Richard W. Tyler may be declared null and void, and that the same may be set aside.

4. That the said deed of conveyance made by the said Sarah L. Crane to the said Benjamin U. Keyser, bearing date on the
46 11th day of November, 1878, may be declared null and void as to the rights and interests of this defendant, and may be set aside, and that this defendant may be put in possession of said property.

5. That the said Benjamin U. Keyser may be required to account for the moneys which he has collected from the said property in controversy, and that the same may be paid over to this defendant for her separate use and benefit, and also that she may have a decree against the assets of the said bank for the damages resulting to her through the wrongful action of its officers.

6. That the said property on the corner of Ninth and G streets may be conveyed to trustees for her sole and separate benefit, as of right it ought to be, so that it may not be interfered with by her said husband, John Hitz, or seized upon or molested by any of his creditors.

7. She also prays that she may have such other and general relief as may be agreeable to equity and good conscience.

JANE C. HITZ.

ENOCH TOTTEN,
Sol'r for Jane C. Hitz.

The other parties to this cross-bill are:
Benjamin U. Keyser, John Hitz, Eminel P. Halstead, Robert B. Donaldson, Charles E. Prentiss, William R. Chipley, Sarah L. Crane, William P. Jenks, and Richard W. Tyler.

E. T.

DISTRICT OF COLUMBIA, } ss:
County of Washington, }

Jane C. Hitz, being duly sworn, deposes and on oath says
47 that she has read the foregoing cross-bill by her subscribed, and knows the contents thereof; that the facts therein stated

upon personal knowledge she knows to be true, and that the facts therein stated upon information and belief she believes to be true.

JANE C. HITZ.

Subscribed and sworn to before me this 20th day of October, 1879.

R. J. MEIGS,
Clerk Sup. Ct. D. C.,
By R. J. MEIGS, JR., *Ass't.*

Answer of John Hitz to the Cross-bill Filed by Jane C. Hitz.

Filed Nov. 17, 1879.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

BENJAMIN U. KEYSER
vs.
JOHN HITZ, JANE C. HITZ, ET AL. } In Eq. No. 6583.

To the honorable the judges of the supreme court of the District of Columbia, holding a special term in equity:

The separate answer of John Hitz to the cross-bill filed by Jane C. Hitz in the above-entitled cause respectfully shows:

First. That it is true that said original bill of complaint in this cause was filed by the complainant, Benjamin U. Keyser, on
48 the 10th day of January, 1879, against the parties defendant mentioned in the first paragraph of the said cross-bill, and that all the parties have filed answers thereto.

Second. It is true that the principal object of the original bill filed in this cause is to reinstate the deed of trust bearing date on the 26th day of January, 1876, and made by defendants John Hitz and Jane C. Hitz, his wife, to Robert B. Donaldson and Charles E. Prentiss, in trust, which said deed had been released by a deed of release bearing date on or about the 16th day of June, 1877, as set forth in the said original bill.

Third. It is also true that said Jane C. Hitz is the only child and the sole heir-at-law of the said Michael Shanks, deceased, who died intestate on the 20th day of May, 1864, leaving Catherine N. Shanks and the defendant Jane C. Hitz him surviving; and it is also true that at the time of his said death the said Michael Shanks was possessed of a large estate, both real and personal, and that amongst said real estate of which he was seized in his own right in absolute fee was a property known as lot numbered three (3) and the west thirty (30) feet of lot numbered two (2), in square numbered four hundred and five (405), located on the corner of "9th" and "G" streets, in the city of Washington; and respondent charges that said piece of property, and more especially lot three (3), has been vastly improved by the erection thereon by this respondent since the death of the said Michael Shanks of a large brick building, com-

prising five store-rooms and sundry other apartments, by reason whereof the said property is now valued by the complainant
49 in this cross-bill at forty thousand dollars ($40,000), it being at the date of the death of the said Michael Shanks, in 1864, assessed at ten thousand seven hundred and eighty-one dollars ($10,781.00).

Fourth. That it is true that some time in the year 1872 a banking institution was established in the city of Washington called the German-American savings bank, which was subsequently converted, under an act of Congress authorizing said conversion, into the German-American national bank, and it is further true that this respondent was the first president of the said savings bank and after its conversion into the German-American national bank aforesaid became the president of that bank and continued to be president thereof until its failure on October 30th, 1878; that it is not true, as alleged, that the affairs of the said German-American savings bank were embarrassed at any times in the years 1875 and 1876, as alleged in the said cross-bill, or that it became important to the credit of the said bank that money should be procured for the purpose of relieving it from its distress, but, to the contrary thereof, this respondent avers that during the time mentioned—that is, during the years 1875 and 1876—the stock of the said savings bank was worth its par value and was sold for that value in the market. This respondent, further answering, denies that any combination or conspiracy was made between him and the said Charles E. Prentiss and other persons, fraudulent or otherwise, as is alleged in said cross-bill, for the purpose of procuring from the said complainant conveyance of her separate estate located on the corner of "9th" and "G" streets, as aforesaid, without any consideration for such conveyance
50 to the said complainant, and your respondent further denies that the deed bearing date on the 26th day of January, 1876, particularly mentioned and set forth in the said cross-bill, was procured to be executed in the manner set forth in the said cross-bill, and that any inducements were held out to said complainant to execute said deed, such as are set forth and contained either in the said cross-bill or in the answer of the said defendant, Jane C. Hitz, to the original bill filed in this cause; and this respondent, further answering, says that on or about May 6th, 1875, at a meeting of the board of trustees of the German-American savings bank, in conformity with the authority conferred upon them by law, it was voted that the capital stock of the said savings bank be increased from fifty thousand dollars ($50,000), its original limit, to two hundred thousand dollars ($200,000), the main object of this increase being to make provision for the purchase of the property known at that time as "Federal block," on the southeast corner of "7th" and "F" streets, in the said city of Washington, occupied in part by said bank as its banking-house; that at this time this respondent, for the purpose of enabling said bank to complete the subscription to its said stock and upon the faith that he had in the value of the said stock, both present and prospective, subscribed for a large amount of the said stock, both on account of

himself and on account of other parties for whom he become responsible to the bank; that, being desirous under these circumstances to pay or so arrange the indebtedness incurred by him on account of the aforesaid stock that the bank should be secure therefor, he transferred or caused to be transferred to the said Jane C. Hitz, on or about the 21st of January, 1876, twenty thou-
51 sand dollars' ($20,000) worth of the capital stock of the aforesaid German-American savings bank, the value of which in the market at that time was par, and which he believed to be amply worth the amount so stated as its value, and which he also believed would in course of time greatly increase in value, and having made this transfer, he asked his wife to execute the deed bearing date on the 26th of January, 1876, by which certain notes covering the amount of twenty thousand dollars ($20,000), drawn by one Chipley to the order of one E. P. Halstead, should be secured, the same when so secured to be transferred to the bank and held as security for the payment of the amount of debt so as aforesaid incurred by him; that accordingly, with the full knowledge, as this respondent avers and charges, of the whole of this transaction and of its design and purpose and in consideration of the transfer of the said twenty thousand dollars' ($20,000) worth of stock so made, as aforesaid, of which she was fully advised, the said Jane C. Hitz willingly, and without any inducement on the part of this respondent, and without any act on his or on the part of the said Charles E. Prentiss and others which might in any way be construed as affecting or controlling her in the exercise of her judgment and discretion in the matter, executed the said deed of January 26th, 1876, by which she conveyed to the trustees Donaldson and Prentiss the said property on the corner of "9th" and "G" streets, in the said city of Washington, to secure the payment of the said notes hereinbefore referred to, made by said Chipley, when they should mature; that the said Jane C. Hitz has at all times been overcautious in all matters of business, and your respondent avers that not only was she without influence on his part in the transaction of this busi-
52 ness, but that even if he had purposed and attempted to induce her to make conveyance of her real estate for the purpose of securing the debt or for any other purpose of which she was not fully advised, that she would have refused to have executed any such conveyance; and this respondent, further answering, says that the said deed of trust made by him and the said Jane C. Hitz to the said trustees, Donaldson and Prentiss, to secure the said notes of Chipley is in every respect correct and proper and free from all fraud having any tendency to vitiate it and render it of no effect; and this respondent, further answering, says that after this transaction had been consummated the said Jane C. Hitz treated the stock so transferred to her as the consideration moving to her for the execution of the said deed as her own; that she was paid, as already appears in this case, the first dividend upon said stock that became payable after the said transfer, and was paid also each successive dividend declared upon the said stock by said German-American

savings bank and the said German-American national bank up to the time that the latter failed and went into the hands of the receiver; and, further, that the said Jane C. Hitz at the time that the said German-American savings bank was converted into the German-American national bank *as* a holder of the stock of the said German-American savings bank with full knowledge of their purport, the papers necessary to signify her consent as such stockholder to the change in said banking institution, as will appear from the said papers in the office of the Comptroller of the Currency of the United States.

Fifth. That it is true that about the 15th of June, 1877,
53 said property was conveyed to one Sarah L. Crane by a deed made on that day on the part of this respondent and his wife to the said Crane, which said conveyance was publicly announced, June 26th, 1877, under the heading of local news, in the article entitled "Real-estate transfers," in the "Evening Star," a newspaper of the city of Washington whereof the said complainant is a regular reader, but this respondent denies that the said transfer was made for any such purpose as is stated in the said cross-bill—that is to say, for the purpose of defrauding the said Jane C. Hitz of her separate estate without any consideration—and this respondent says, to the contrary of the said allegation, that the said deed was made under the conditions and circumstances following—that is to say: he was desirous for several reasons to place the loan hereinbefore referred to as represented by the notes of the said Chipley, secured by the aforesaid deed of trust on the said property, in a different and more convenient form; that among the reasons inducing him to make this change was the fact that the Comptroller of the Currency of the United States had requested the bank, through the examiner appointed for that purpose, and also advised this respondent verbally, to reduce the loans made by the bank upon security of real estate for the benefit of the credit and character of the said bank, of which he was the president; that he found that he could obtain a loan upon the said real estate at a lower rate of interest and under circumstances every way more advantageous; and your respondent, further answering, says that, moved by these circumstances, he took steps to change the loan which he had before that obtained of the bank, and for that
54 purpose, and in order that his name might not again appear in the transaction as a borrower of money, he obtained the consent of his wife, to whom he fully explained the transaction and who thereupon united with him in the conveyance of the said property to the defendant Sarah L. Crane, in order that she might execute the conveyance, mentioned in the bill, by which the property in question was transferred to R. W. Tyler, as trustee, to secure the defendant Jenks the money advanced by him for the purpose of enabling this respondent to take up the loan obtained on the notes of the said Chipley; that, in order to make this transaction complete, it was necessary that the said trustees, Donaldson and Prentiss, under the former deed of trust should execute a release of the said trust, and that said release was accordingly made,

the money loaned by the said Jenks to this respondent having been paid to the bank and his aforesaid indebtedness thereto fully satisfied and paid off.

That, in so far as the complainant in the cross-bill, the said Jane C. Hitz, is concerned, she retained in her hands twenty thousand dollars' ($20,000) worth of stock which this respondent had transferred to her in manner as aforesaid as a consideration to her for the conveyance made by her in trust to the said Donaldson and Prentiss, and was paid dividends thereon by said bank after said transaction; that it is true, as alleged in the said cross-bill, that the conveyance in fee of the said property by this respondent and the said Jane C. Hitz to Sarah L. Crane and the deed of trust by the said Sarah L. Crane to R. W. Tyler were all part of one and the same transaction, and, as far as this respondent is informed, that it is also true that these several deeds were all put upon record

55 at the same time, but this respondent, further answering, denies that said deeds are in any respect fraudulent, and avers that there is no reason why the same should be declared by this court null and void; that it is not true, as is alleged in said cross-bill, that the said Jane C. Hitz never received any consideration for the conveyance of the said property to the said Sarah L. Crane, or that said conveyances were procured by any combination or conspiracy for the purpose of cheating and defrauding her, the said Jane C. Hitz, out of her separate estate, as is alleged in the said cross bill, and, to the contrary thereof, this respondent avers that the said transaction was in every respect as he has declared it in detail, and that the said Jane C. Hitz retains in her hands up to this day the consideration heretofore mentioned—that is to say, the stock of the said bank transferred to her by this respondent in manner as aforesaid; and this respondent, further answering, says that it is not true that the said Sarah L. Crane was used for any fraudulent purpose in the said transaction or for the purpose of concealing its true character, nor is it true that the said conveyance was never delivered to the said Sarah L. Crane, and, to the contrary thereof, he avers that said Sarah L. Crane was made a means of transferring this property in the manner above mentioned in conformity with a custom prevailing in this District in matters of loans made on real estate by bankers and brokers and for the purpose of preventing the fact that this respondent, then the president of a bank, was a borrower of money for any purpose from being known to the general public and so become liable to misconstruction, it being the custom at that time for some of the papers of the said city of Washington to publish in their columns a list of

56 the conveyances in trust made by parties during each day; and, further answering, this respondent says that he is not advised how far the character of the conveyances before referred to constituted notice to the said Jenks and Tyler sufficient to put them upon inquiry, but he does say that if such inquiry had been made it would have appeared that the transaction was as he has detailed it, and free from all taint of fraud in any respect; and this respondent denies that the money advanced by the defendant Jenks upon

the said note was paid over to the said defendant, Prentiss, for the purpose of said bank or for the purpose of this defendant and Prentiss together, and, to the contrary thereof, he avers that the said money was paid into the said bank for the purpose of paying the notes made by the said Chipley and then held by the said bank, and that the said money was so applied as appears from the books and records of said bank.

Sixth. And this respondent, further answering, says it is possibly true that at the time that the said acknowledgment of the deed to the said Donaldson and Prentiss and of the deed to the said Sarah L. Crane—that is to say, on the 26th of January, 1876, and on or about the 15th day of June, 1877—the said S. F. Austin, the notary public before whom the acknowledgments of the said deeds were taken, was the assistant cashier of the said German-American savings and national bank; that this respondent is not advised whether the said Austin ever explained to the said Jane C. Hitz the character of the said papers before taking the said acknowledgments, except in so far as he is advised of that fact by his knowledge of the custom of the said Austin in taking acknowledgments, and the

57 fact that the said Austin has testified in this case that he asked the said Jane C. Hitz before taking her acknowledgment whether she was acquainted with the contents of the said deed and obtained her acknowledgment that she was so informed; but this respondent, further answering, says that however this may be that *he did* explain to the said Jane C. Hitz before the execution of the said deeds their full character and purport, and he denies that there was any conspiracy or combination to obtain the consent of the said Jane C. Hitz to the said papers as is alleged in said cross-bill, and, to the contrary thereof, avers that the said Jane C. Hitz had the said deed fully explained to her by this respondent and made the same with entire knowledge of the contents thereof and willingly and freely and without any inducements on the part of this respondent; and this respondent, further answering, says that it is untrue as alleged in said bill that the said Jane C. Hitz had never prior to the dates of the deeds in question made any conveyances of her separate estate, and that she was unwilling so to do, and, to the contrary thereof, avers that the said Jane C. Hitz, whilst she was sojourning abroad, this respondent being in the United States, did, on the 17th day of April, 1875, duly acknowledge before Charles H. Upton, United States consul at Geneva, Switzerland, a deed in fee of her separate estate in and to the east twenty-three (23) feet of lot fourteen (14), in square four hundred and fifty-six (456), to Samuel L. Mattingly, as will more fully and at large appear upon reference to the land records of the District of Columbia, Liber 784, folio 331, and that she made, executed, and acknowledged said deed with a full knowledge of its purport and effect.

58 Seventh. That it is true that the said German-American national bank on the 30th of October, 1878, closed its doors and was afterwards declared insolvent, and that the complainant in the original bill, said Benjamin U. Keyser, was placed in charge of its affairs as receiver under the act of Congress; that after the appoint-

ment of the said Benjamin U. Keyser as receiver and on or about the 11th day of November, 1878, the aforesaid Sarah L. Crane executed, acknowledged, and delivered to the said Benjamin U. Keyser, at his urgent request, as this respondent is advised and believes, a deed whereby she undertook to convey to him any equity which she might have in the said property conveyed to her by the said conveyance of June 16th, 1877, from the complainant Jane C. Hitz and this respondent; that the said B. U. Keyser, as this respondent is advised and believes, unlawfully took possession of the said property under the said deed, and ever since has been collecting the rents thereof, and has large sums of money in his hands so collected which this respondent is advised and believes the complainant Jane C. Hitz is entitled to recover, and this respondent further avers that the said Sarah L. Crane, upon discovery that she had been induced erroneously to so convey the equity hereinbefore mentioned to the said B. U. Keyser, did, on or about the 6th day of June, 1879, file a cross-bill in this cause, praying that said erroneous conveyance to said B. U. Keyser might be set aside.

Eighth. This respondent, further answering, says, in reply to the eighth paragraph of the said bill, that after the death of the said Michael Shanks letters of administration upon his estate were
59 granted to one James Adams, of the said city of Washington, and that in conformity with law he returned an inventory of the personal estate of the said Shanks, from which it appears that the said personal property amounted to the sum of $97,384.60, and at the time of the filing of said inventory there had been collected and was in the hands of the said administrator the sum of $15,900.24, together making the sum of $113,284.84; from this were deducted allowances made by the court by which said sum was reduced to $105 362.01, this last sum being the full amount of the personal estate of the said Shanks as it came into the hands of the said administrator for distribution, and that the said administrator distributed the said sum as follows:

To Mrs. Catherine N. Shanks, the widow of the deceased, he paid one-third of the said amount—that is to say, $35,187.33⅓—and to Mrs. Hitz, wife of John Hitz and daughter of the deceased, he paid $70,374.66⅔, less ⅓ of one per cent. deducted for the United States legacy tax, making the whole amount so paid to the said Mrs. Jane C. Hitz, daughter of the said deceased, $69,846.86; all of which will more fully and at large appear from the record designated "Z. C. R." No. 3, of the orphans' court of the District of Columbia, page 152, from which it will also appear that the said inventory was sworn to and approved and passed by the court on the 27th of June, 1865; and this respondent, further answering, says that the said sum so paid to his wife is therefor- nearly one-half less than the amount alleged to have been inherited by her in the paragraph of the said cross-bill to which he is now responding. This respondent, further answering, says that in 1864, the year in which the said
60 Michael Shanks died, the real estate belonging to him in the said city of Washington, as is shown by reference to the tax books thereof, was assessed at $91,755.60, and that in the opinion of

this respondent it was not worth more in the condition in which it was at that time than its assessed value, if, indeed, it was worth so much, and that the entire amount collected as revenue from the said real estate by the said Michael Shanks in the year 1863, the year before he died, as appears from accounts kept by him at the time, was $5,118.48; that at the time of the death of the said Michael Shanks the improvements erected upon the said real estate and forming part thereof were mostly in a very dilapidated condition, some of them having been reported as a nuisance to the authorities, and that it was necessary in order to make the said estate productive to expend large sums of money upon improvements, and that in this condition of affairs said respondent applied to the erection of buildings upon portions of said real estate and to the improvement of those already erected upon other portions of the said real estate the largest part of the said personal estate that had come into his hands from the said administrator of the said Michael Shanks as the portion of his said wife and of the income received from the whole of said estate for several years, and that it appears from accounts kept by your respondent of expenditures made by him in and about the said improvements and repairs and upon the payment of taxes upon the said real estate that he has expended about the sum of $83,356.14 upon the said real estate in the manner above mentioned; that it is true, as is alleged in the said 8th paragraph of the said cross-bill, that a large portion of the time
61 since the death of the said Michael Shanks has been spent by the said Jane C. Hitz, the complainant in the said cross-bill, in travelling in Europe, and it is further true that at all times, not only during the time when the said Jane C. Hitz was absent in Europe travelling, as is stated in the said cross-bill, but during the time when she was in this country, this respondent has had charge of the property belonging to her as the heir of the said Michael Shanks and has managed the same for the benefit of his family, the income derived therefrom being combined with his own income and largely devoted to the payment of the expenses of the said family, which, owing to the fact of their having from time to time been for long periods abroad travelling at considerable expense, have been proportionately great; that out of the income of the said estate, in addition to all of these expenses, there has been paid by this respondent in all the sum of 39,041.31 or thereabouts as annuity to Catherine N. Shanks, widow of the said Michael Shanks. This respondent further says that during the period that has intervened since the death of the said Shanks he has purchased, out of the moneys in his hands from various sources, and, among others, from the estate belonging to his wife, as aforesaid, a large property in the said city of Washington, which has for many years been the homestead of the family and it is now occupied as such homestead, the amount expended in and about the purchase thereof and its improvement amounting, as he believes, to about the sum of $30,000; and this respondent, further answering, denies that any portion of the said estate of the said Jane C. Hitz, his wife, has been lost by his mismanagement, but, to

the contrary thereof, he avers that he has so managed her
62 estate that, notwithstanding the fact that she has from time to time disposed of certain portions of it, her remaining unencumbered realty now yields an income to her of $7,300 per annum, or $2,181.22 in excess of the amount of revenue received from said entire estate by the said Michael Shanks in the year preceding his death; that it is true that the said Jane C. Hitz did convey a portion of her property situated on Pennsylvania avenue in trust to secure an alleged indebtedness on the part of this respondent, but it is not true that she was procured to make such conveyance without consideration or for any purpose except that mentioned; that the main consideration upon which said Jane C. Hitz conveyed said property was that this respondent would unite with her in the conveyance of all of her property to trustees for her sole and separate benefit during her life, and this respondent avers that the deed made by him to William G. Metzerott and Samuel Cross, trustees, will upon examination show that the conveyance therein contained and which is here referred to was made for the purpose above indicated.

Ninth. That it is true, as alleged in said cross-bill, that on the 9th day of December, 1878, soon after the failure of the said German-American national bank, this respondent joined in a conveyance, in due form of law, to William G. Metzerott and Samuel Cross, in trust for the separate and sole use of his wife, said deed being the one heretofore referred to; that said deed was duly signed and acknowledged and was recorded on the 13th of May, 1879, in Liber 913, folio 437, and was made for the purpose of conveying to said trustees all of the said property inherited by the said Jane C. Hitz
as her separate estate not theretofore conveyed either ab-
63 solutely or in trust, but this respondent denies that said deed was made and delivered in consideration of money which he, said respondent, had lost out of the separate estate of his said wife, and, to the contrary thereof, avers that the consideration for the said deed was as hereinbefore set forth—that is to say, in consideration of his wife's having executed a deed of the property on Pennsylvania avenue known as the New York Restaurant property in trust to secure an alleged indebtedness of this respondent, as hereinbefore set forth, and for the further purpose of making and placing on record a full, absolute, and free disclaimer and waiver of all interest whatsoever which could in anywise be said to appertain or belong to him by virtue of his marital relations, and to remove all doubts in regard to the title of the complainant, said Jane C. Hitz, in and to the real estate inherited by her from her said father, and so more effectually to protect the said estate of his wife from any liability which this respondent might in the course of his business life hereafter incur.

And, having fully answered, respondent prays to be hence dismissed with his reasonable costs, &c.

JOHN HITZ.

W. B. WEBB, *Solicitor.*

I, John C. Hitz, being duly sworn, depose and say that I have heard the foregoing answer read and know its contents, & that the matters and things therein stated as of my own knowledge are true, and those stated on information and belief I believe to be true.

JOHN HITZ.

64 Subscribed and sworn to before me Nov. 17, 1879.

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR., *Ass't.*

Joinder of Issue on Answer of John Hitz.

Filed Nov. 25, 1879.

In the Supreme Court of the District of Columbia.

B. U. KEYSER, Receiver, &c., *vs.* JOHN HITZ ET AL. } Equity. No. 6583.

And now comes the said Jane C. Hitz and takes issue upon the answer of the defendant John Hitz to her cross-bill in the above-entitled cause.

ENOCH TOTTEN,
Sol'r for Jane C. Hitz.

65 *Answer of Def't John Hitz to Amended and Supplemental Bill of Compl't Keyser.*

Filed Dec. 30, 1879.

In the Supreme Court of the District of Columbia.

BENJ. U. KEYSER, Receiver, &c., *vs.* JOHN and JANE C. HITZ and Others. } Equity. No. 6583.

The separate answer of John Hitz to the amended and supplemental bill of the complainant Keyser shows as follows:

First. In answer to the first paragraph of the said amended and supplemental bill he says that he does not know when the said complainant discovered the existence of the said conveyance to Metzerott and Cross, but he says that such a conveyance was made and was duly recorded.

Second. Answering the second paragraph of the said bill, he emphatically denies the charge contained therein that the object of the said deed to Metzerott and Cross was to hinder, delay, and defraud the complainant in the collection of money due to him as receiver or in any other way, and he avers that the said deed was made in good faith and (as he is advised by counsel and believes) as he and the defendant Jane C. Hitz had a perfect right to do in law and in equity.

JOHN HITZ.

DISTRICT OF COLUMBIA, *County of Washington*, } ss:

John Hitz, being first duly sworn, deposes and on his oath
66 says that he has read the foregoing answer by him subscribed and knows the contents thereof; that the facts therein stated upon personal knowledge he knows to be true, and those stated upon information and belief he believes to be true.

JOHN HITZ.

Subscribed and sworn to before me this 30 day of December, 1879.

R. J. MEIGS, *Cl'k*,
By R. J. MEIGS, JR., *Ass't*.

Answer of Keyser to Cross-bill of Jane C. Hitz.

Filed Jan. 3, 1880.

In the Supreme Court of the District of Columbia.

B. U. KEYSER, Receiver,
vs.
JOHN HITZ ET AL. } 6583. Equity.

The answer of Benj. U. Keyser, receiver, &c., to the cross-bill of the defendant Jane C. Hitz in this cause exhibited, &c.

For answer unto said cross-bill and so much and such parts thereof as he is advised he should answer, this respondent says:

1st. He believes the 1st paragraph correctly recites the condition of the record of the cause so far as it appeared at the time of
67 filing said cross-bill.

2d. This respondent admits the correctness of the averments of this paragraph, but he objects to the words "alleged deed of trust" in referring to the trust of January 26, 1876.

3d. Respondent believes the statements contained in this paragraph to be true, excepting as to the value of the real property particularly mentioned.

4th. Respondent has no doubt that a fraudulent combination and conspiracy existed between the defendants John Hitz and Prentiss for, among other things, to obtain the assets of the German-American national bank, and he has no doubt that said conspiracy was materially aided and abetted by the defendant Jane C. Hitz, who files this cross-bill, and he avers the fact to be that the said Jane C. Hitz signed, sealed, and acknowledged the deed of trust of January 26, 1876, to the defendants Donaldson and Prentiss, and delivered the same, and in consideration thereof there was transferred to her name 200 shares of the stock of the German-American savings bank, worth $20,000 and upwards, and she received or endorsed checks amounting to $2,400 in payment of dividends on said stock.

Further answering this paragraph, respondent says that the said Jane C. Hitz is a woman of more than ordinary intelligence, and he

believes, and so believing charges, that her statements in respect of her ignorance as to the nature, contents, and purpose of the aforesaid conveyance are grounded upon a desire to recover her property, and are not in accordance with the established facts of the case.

68 5th. Answering this paragraph, this respondent neither admits nor denies the averments thereof, excepting in so far as they may affect his rights as receiver aforesaid, in which event he calls for strict proof as to each and every allegation which may relate to his interest in the premises.

6th. This respondent denies that the notary public who took the acknowledgment of the said Jane C. Hitz to the deed of trust of January 26, 1876, did not explain the same to her, and he avers that she stated to said notary that she fully understood the said deed before said acknowledgment was taken. This respondent further denies the remainder of said paragraph, in so far as it relates to said deed of January 26, 1876.

7th. Answering this paragraph, respondent says that the property on the corner of 9th & G Sts. is rightfully in his possession, since he holds as receiver two unpaid promissory notes representing $20,000, secured by deed of trust thereon, in consideration whereof the said Jane C. Hitz received a transfer of $20,000 of the stock of the German-American savings bank, as aforesaid, and in addition thereto her grantee, one Sarah L. Crane, conveyed the equity of redemption in and to said property by deed of indenture exhibited in this cause. Respondent admits that he has received by virtue of said last-mentioned conveyance and by virtue of his office as receiver of said bank on account of said unpaid notes the rent of said property from the 9th day — December, 1878, to this date, amounting to $1,693.91 nett; but he denies that the said Jane C.

69 Hitz (notwithstanding the advice of her counsel) is entitled to recover any portion thereof, but the same belongs to the creditors of said bank, who have been grossly swindled by the defendants Hitz, Prentiss, and others.

8th. Respondent does not personally know anything about the domestic affairs of the defendants Hitz, but he avers that the said Jane C. Hitz made the conveyance of the property on Pennsylvania avenue with full knowledge of her act and the purpose thereof.

9th. Respondent calls for strict proof of statements contained in this paragraph, in so far as they affect his rights in the premises, and he avers that at the time of filing his original bill in this cause he had no knowledge of said conveyance to Metzerott and Cross, which, although executed and delivered in December, 1878, was not recorded until May, 1879.

And having fully answered, &c., this respondent prays to be hence dismissed, &c.

BENJAMIN U. KEYSER.

I do solemnly swear that I have heard read the foregoing and annexed answer by me subscribed and know the contents thereof;

that the facts therein stated on my personal knowledge are true, and that those stated on information and belief I believe to be true.

BENJAMIN U. KEYSER.

Subscribed and sworn to before me this 23rd day of December, 1879.

[SEAL.] JAMES H. GRIDLEY,
Notary Public.

ELLIOT & ROBINSON,
Solicitors & of Counsel for Respondent.

70 *Joinder of Issue on Answer of Keyser to Cross-bill of Jane C. Hitz.*

Filed Jan. 3, 1880.

In the Supreme Court of the District of Columbia.

B. U. KEYSER, Receiver, &c.,
vs.
JOHN and JANE C. HITZ and Others. } Equity. No. 6583.

And now comes the said Jane C. Hitz and takes issue upon the answer of Benjamin U. Keyser to the cross-bill heretofore filed by her in this cause.

ENOCH TOTTEN,
For Jane C. Hitz.

Amended and Supplemental Bill.

Filed Jan. 3, 1880.

In the Supreme Court of the Dist. of Cola.

BENJM. U. KEYSER, Receiver, &c.,
vs.
JOHN and JANE C. HITZ, His Wife; EMINEL P. Halstead, Robert B. Donaldson, Charles E. Prentiss, William R. Chipley, Sarah L. Crane, W. P. Jenks, Richard W. Tyler, Wm. G. Metzerott, and Samuel Cross, Defendants. } Equity. 6583, Doc. 19.

The amended and supplemental bill of Benjm. U. Keyser,
71 receiver and complainant in this cause.

This complainant, by leave of the court first had and obtained, files this his amended and supplemental bill; and thereupon he avers and charges:

1st. That since the filing of the original bill in this cause he discovered that the defendants John Hitz and Jane C. Hitz, his wife, did, by deed of indenture bearing date the 9th day of December, A. D. 1878,

recorded on the 17th day of May, A. D. 1879, in Liber 913, folio 437, of the land records of the District aforesaid, convey all their right, title, interest, and estate in and to all and singular the real property of said defendants in said District unto the defendants Metzerott and Cross in trust for the sole and separate use of the defendant Jane C. Hitz; that said deed of conveyance includes the real property mentioned in paragraph 12 of the original bill in this cause as well as all other property of said defendants not theretofore conveyed or otherwise disposed of.

2. That said conveyance was manifestly intended to hinder, delay, and defraud this complainant in the collection of any sum or sums of money due to him as receiver by reason of the facts set out in the original bill in this cause, and ought, as to complainant, to be held void in respect of the several pieces or parcels of real property mentioned and described in said original bill.

Wherefore and inasmuch as complainant is without remedy, &c., he prays:

72 1. That the said William G. Metzerott and Samuel Cross may be made defendants hereto and required to answer.

2. That said conveyance of Dec. 9, 1878, from the defendants John Hitz and Jane C. Hitz, his wife, to the said Metzerott and Cross may be declared to be subject to the right of this complainant to the satisfaction of the said promissory notes secured by the trust deed of January 26, 1876, if the subsequent deed of trust to the defendant Tyler to secure the defendant Jenks shall be finally declared to be entitled to priority in respect of the real property therein described; and—

3rd. For such other and further relief as the nature of the case may require and as to the court may appear equitable and just.

BENJAMIN U. KEYSER.

I do solemnly swear that I have heard read the foregoing and annexed bill by me subscribed & know the contents thereof; that the facts therein stated on my personal knowledge are true, and that those stated on information and belief I believe to be true.

BENJAMIN U. KEYSER.

Subscribed & sworn to before me this 23rd day of December, A. D. 1879.

JAMES H. GRIDLEY,
[SEAL.] *Notary Public.*

(Endorsed:) We consent to the filing of this amended and supplemental bill. Enoch Totten, for Mrs. Hitz; W. B. Webb, for John Hitz.

73 *Answer of Defendant Jane C. Hitz to Amended and Supplemental Bill of Compl't Keyser.*

Filed Jan. 3, 1880.

In the Supreme Court of the District of Columbia.

BENJ. U. KEYSER, Receiver, &c., vs. JOHN and JANE C. HITZ and Others. } Equity. No. 6583.

The separate answer of Jane C. Hitz to the amended and supplemental bill of the complainant Keyser shows as follows:

First. In answer to the first paragraph of the said amended and supplemental bill, she says that she does not know when the said complainant discovered the existence of the said conveyance to Metzerott and Cross, but she says that such a conveyance was made and was duly recorded.

Second. Answering the second paragraph of the said bill, she emphatically denies the charge contained therein that the object of the said deed to Metzerott and Cross was to hinder, delay, and defraud the complainant in the collection of money due to him as receiver or in any other way, and she avers that the said deed was made in good faith and (as she is advised by counsel and believes) as she and the defendant John Hitz had a perfect right to do in law and in equity.

JANE C. HITZ.

ENOCH TOTTEN,
For Jane C. Hitz.

74 DISTRICT OF COLUMBIA, *County of Washington,* } ss:

Jane C. Hitz, being first duly sworn, deposes and on her oath says that she has read the foregoing answer by her subscribed and knows the contents thereof; that the facts therein stated upon information and belief she believes to be true, and those stated upon personal knowledge she knows to be true.

JANE C. HITZ.

Subscribed and sworn to before me this 30th day of December, 1879.

HUGH T. TAGGART,
Justice of the Peace. [SEAL.]

Separate Answer of Richard W. Tyler to Cross-bill.

Filed Jan. 29, 1880.

In the Supreme Court of the District of Columbia, the 26th Day of January, 1880.

BENJAMIN U. KEYSER, Receiver, vs. JOHN HITZ ET AL. } No. 6583, Eq. Doc.

The separate answer of the defendant Richard W. Tyler to the cross-bill of the defendant Jane C. Hitz.

This defendant, not waiving any right of exception to the manifest errors and imperfections of the said cross-bill, but ex-
75 pressly insisting thereon and claiming therefrom the same benefit which he would have had on plea or demurrer, for answer unto so much of said cross-bill as he is advised that it is necessary for him to make answer unto, answering separately, saith:

1. He admits the allegations contained in paragraph No. 1 of said cross-bill.

2 & 3. He cannot admit the averments contained in paragraphs Nos. 2 and 3 of said cross-bill, but requires proof thereof, so far as the same may be material to his interests.

4. Nor can this defendant admit the truth of the averments contained in paragraph No. 4 of said cross-bill, but he requires strict proof thereof, so far as the same may be material to his interests.

(*a.*) With respect to the averments in said paragraph contained concerning an alleged conspiracy between the defendants Hitz and Prentiss and certain other unknown persons, this defendant denies all knowledge of said conspiracy.

(*b.*) With respect to the averments in said paragraph contained relating to the possession by the said Jane C. Hitz of a separate estate, this defendant upon information and belief denies that the said Jane C. Hitz had any such separate estate.

(*c.*) With respect to the averments of fact contained in said bill, this defendant says that he has no personal knowledge thereof, but he is informed and believes that the said Jane C. Hitz received full consideration for the deed of trust executed by her husband and herself to the defendants Donaldson and Prentiss upon the
76 premises mentioned in said paragraph to secure the notes mentioned by her as the Chipley notes, *to wit*, a certain transfer of $20,000 of stock of the German-American savings bank, made to her shortly after the execution by her of the said deed of trust to Donaldson and Prentiss to secure said Chipley notes; and this defendant avers upon information and belief that at sundry times thereafter the said Jane C. Hitz received from the said bank the sum of $2,400 in three separate payments of $800 as dividends upon the said $20,000 with respect to the stock so transfered to her,

and that she appropriated and used the said dividends; that the said three payments of $800 each were made to her by checks payable to her order, and that it was expressed upon the face of said checks that they were given in payment of dividends upon certain capital stock standing upon the books of the bank in the name of the said Jane C. Hitz; and this defendant is informed by counsel and *be* avers that the said Jane C. Hitz is estopped from impugning the validity of the said deed of trust to said Donaldson and Prentiss upon the premises in said paragraph mentioned to secure said Chipley notes, *first*, by reason of her acknowledgment of said deed of trust before a competent officer authorized to take such acknowledgments in the District of Columbia, viz., one S. F. Austin, a notary public, before whom said deed was acknowledged; and *further*, by reason of her having accepted the consideration in this paragraph heretofore mentioned, viz., the transfer to her of said bank stock.

This defendant has no personal knowledge in regard to any matters of fact in said paragraph averred save as is hereinbefore stated.

77 Upon advice of counsel he denies that said deed of trust is fraudulent and void as to her, the said Jane C. Hitz, or that it ought to be declared void and set aside.

5. With respect to the averments contained in paragraph No. 5 of said cross-bill, this defendant says that he has no personal knowledge with respect to the same, other than is contained in his answer to the original bill filed in said cause, and he begs leave to incorporate so much of said answer as is contained in paragraphs numbered from 4 to 7 of the said answer, inclusive, as a part of his answer to the said cross-bill, and he here reiterates and reaffirms the same and every part thereof as fully as if the same were here repeated *in extenso*.

(*a*.) With respect to so much of the averments in said paragraph No. 5 of said cross-bill as avers a conspiracy on the part of the said Hitz and Prentiss and other persons to the said Jane C. Hitz unknown, for the purpose of defrauding her, the said Jane C. Hitz, out of her separate estate or in any other manner defrauding her, this defendant says that he has no knowledge whatever; that, on the contrary, he has every reason to believe that the said averments are untrue, and on information and belief he denies the same.

He further avers, by instruction of counsel, that the said Jane C. Hitz is estopped from disputing the validity of the deed in fee-simple executed by herself and her husband to Sarah L. Crane, *first*, because of her execution of the same before a competent officer authorized to take acknowledgments of conveyances of real estate within the District of Columbia, the defendant William P.

78 Jenks having acted upon the faith of the validity of said acknowledgment, and also because the said Jane C. Hitz received valuable consideration therefor to at least the extent of $20,000, that sum having been paid by the said Jenks for the purpose of extinguishing and having in fact extinguished a prior valid charge of $20,000 on the property specified in said cross-bill and claimed by said Jane C. Hitz as her separate property.

6. This defendant cannot admit the truth of the averments contained in paragraph No. 6 of the said cross-bill, but requires strict proof thereof. By advice of counsel he repeats his averments with respect to the estoppel operating upon the said Jane C. Hitz in regard to the acknowledgments made by her before the said notary public, S. F. Austin, of the deed of trust from herself and husband to Donaldson and Prentiss, trustees, and of the deed in fee from herself and husband to Sarah L. Crane in said cross-bill set out. He admits, however, the fact that the said acknowledgments purport to have been in fact made before the said Sidney F. Austin, notary public, as aforesaid.

7. In answer to the averments contained in paragraph No. 7, this defendant says that he believes it is true that the German-American national bank suspended payment on or about the 31st day of October, 1878, and that the said Benjamin U. Keyser is now receiver of said bank. This defendant further believes it to be true that the said Keyser is now and has for some time past been collecting the rents of the property in said cross-bill described, and that he has received large sums of money into his hands on account of said
79 rents so collected. This defendant has no personal knowledge with regard to the other averments of fact in said paragraph contained and cannot admit the same, but requires proof thereof.

8 & 9. This defendant has no personal knowledge in regard to the averments contained in paragraphs 8 and 9 of said cross-bill, and can neither admit nor deny the same, but requires proof thereof so far as they may be material to his interests.

And now, having fully answered all the matters and things in said cross-bill averred, so far as this defendant has any knowledge thereof, he prays to be hence dismissed with his reasonable costs by him in this behalf most wrongfully sustained.

R. W. TYLER.

R. ROSS PERRY, *Sol'c'r.*

I, Richard W. Tyler, do solemnly swear that I have read the foregoing answer to the cross-bill filed, said answer being by me subscribed, and that I know the contents thereof; that the facts therein stated on information and belief I believe to be true, and that the facts therein stated of my own personal knowledge are true.

R. W. TYLER.

Subscribed and sworn to before me this 29th day of January A. D. 1880.

R. J. MEIGS, *Clerk,*
By R. J. MEIGS, JR., *Ass't.*

80 *Separate Answer of William P. Jenks to Cross-bill.*

Filed Jan. 29, 1880.

In the Supreme Court of the District of Columbia, 27th of Jan'y, 1880.

BENJAMIN U. KEYSER, Receiver, *vs.* JOHN HITZ ET AL. } No. 6583, Eq. Doc.

The separate answer of the defendant William P. Jenks to the cross-bill of Jane C. Hitz.

This defendant, not waiving any right of exception to the numerous errors and imperfections in the cross-bill of said Jane C. Hitz contained, but expressly insisting thereon and claiming the same benefit therefrom which he would have had upon demurrer or proper plea, for answer unto so much of the said bill as he is advised that it is necessary for him to make answer unto, answering separately, saith:

1. I have no information or knowledge in regard to the matters averred in said cross-bill and can make no answer thereunto, save as is hereunto set forth.

During the month of June, 1877, I had the sum of $20,000 which I desired to invest, and which I authorized the defendant Richard W. Tyler, an insurance agent doing business in said District of Columbia, to invest for me. I was first informed by said defendant, Tyler, that he purposed lending $15,000 of this money to a certhin Mr. Baggman, but he subsequently became dissatisfied with the security offered and refused to make the loan. Shortly after that

81 the said defendant informed me that he could invest the said sum to advantage in a real-estate loan upon the property described in said cross-bill, being lot 3 and part of lot 2, in square 405, in the city of Washington, District aforesaid. About the 19th day of June, 1877, the said Tyler came over to Philadelphia, my place of residence, and showed me the abstract of title to said property. I examined this, and after some conversation with him in regard to the title and the advisability of the investment I authorized him to make the loan. On the 18th of June, 1877, I had sent the said Tyler my check for $20,000, a copy whereof is annexed to my answer to the original bill in this cause, which has been returned to me through the Girard national bank as having been by it paid on account of the German-American National Bank of Washington, D. C., and is endorsed by its cashier, the defendant Prentiss. The interest upon this loan is at the rate of 8 per cent. per annum, and is payable quarterly.

The installments of interest were paid promptly to me as they matured until the 18th of December, 1878. A day or two after that date the defendant Tyler came over to Philadelphia and showed me a letter which he had received from the plaintiff, refusing to pay the installments of interest then due, and announcing that all

efforts to collect either principal or interest would be resisted. I was greatly astonished at this proceeding on the part of said Keyser, my money having been loaned in good faith without notice of any defect or irregularity of any sort whatsoever and having been paid to the very bank of which the said Keyser is receiver.

82 On the 21st of December, 1878, I gave written instructions to the defendant Tyler, trustee under the deed of trust securing my loan, and set forth in the original bill, to proceed to a sale in accordance with the provisions of said trust, refusing other or further knowledge in the premises.

I positively deny all knowledge of any conspiracy on the part of said Hitz and Prentiss or either of them, or on the part of them or either of them, and any other person or persons whomsoever, to defraud the said Jane C. Hitz, or the said Keyser, or the said German American national bank, or any other person whomsoever; nor had I any notice of the existence of any such conspiracy or any reason to suspect the existence of the same.

And now, having fully answered the said cross-bill, I pray to be hence dismissed with my reasonable costs by me in this behalf most wrongfully sustained.

I do solemnly affirm that I have read the foregoing answer to the cross-bill in said cause filed, said answer being by me subscribed; that I know the contents thereof; that the matters therein stated of my own knowledge are true, and that the matters therein stated upon information and belief I believe to be true.

WILLIAM P. JENKS,
By R. ROSS PERRY, *Att'y.*

Subscribed and affirmed to before me this — day of ——, A. D. 1880.

—— ——.

This may be filed with the same force and effect as if signed and sworn to by Wm. P. Jenks.

ENOCH TOTTEN,
For Jane C. Hitz.

83 *Stipulation that Case be Heard as if Certain Pleadings were Filed.*

Filed Nov. 17, 1880.

In the Supreme Court of the District of Columbia, the 17th Day of November, 1880. In Equity.

B. U. KEYSER, Receiver,
vs.
JOHN HITZ ET AL. } # 6583, Eq. Doc. # 19.

Stipulation that case may be heard as if sundry pleadings had been filed.

It is hereby stipulated that this case may be heard as if the defendants John Hitz, Jane C. Hitz, R. B. Donaldson, W. R. Chipley,

W. P. Jenks, R. W. Tyler, E. P. Halstead, and C. E. Prentiss had severally made answer denying the allegations and equities of the cross-bill of Sarah L. Crane, filed herein June 6th, 1879, in so far as the same in anywise relate to them, the said defendants, or either of them, and the plaintiff in said cross-bill had thereupon filed replications to said answers.

R. D. MUSSEY,
For the Pl'ff S. L. Crane.
R. D. MUSSEY,
For the Defendants C. E. Prentiss & E. P. Halstead.
W. B. WEBB,
Sol'r for the Def't John Hitz.
ENOCH TOTTEN,
For the Def't Jane C. Hitz.
FRANCIS MILLER,
For the Def't R. B. Donaldson.
R. ROSS PERRY,
For the Def'ts Jenks & Tyler.

84 *Stipulation that Case May be Heard as if Replication Had Been Filed.*

Filed Nov. 17, 1880.

In the Supreme Court of the District of Columbia, the 17th Day of Novm., 1880. In Equity.

B. U. KEYSER, Receiver, &c., *vs.* JOHN HITZ ET AL. } # 6583, Eq. Doc. # 19.

Stipulation that case be heard as if replication had been filed by Sarah L. Crane to def't Keyser's answer to her cross-bill.

It is hereby stipulated that this case may be heard as if the plaintiff Sarah L. Crane in the cross-bill filed herein June 6th, 1879, had filed replication to the defendant Keyser's answer (filed Dec'r 18th, 1879) to her said cross-bill within ten days thereafter.

R. D. MUSSEY,
For the Pl'ff (in Cross-bill) Sarah L. Crane.
ELLIOT & ROBINSON,
For the Def't (to said Cross-bill) Keyser.

85 *Stipulation that Case be Heard as if Certain Pleadings were Filed.*

Filed Nov. 17, 1880.

In the Supreme Court of the District of Columbia, the 17th Day of Nov'r, 1880. In Equity.

B. U. KEYSER, Receiver, &c., *vs.* JOHN HITZ ET AL. } #6583, Eq. Doc. #19.

Stipulation that case be heard as if sundry pleadings had been filed.

It is hereby stipulated that this case may be heard on the papers, pleadings, and testimony now on file herein as if the defendants C. E. Prentiss, Sarah L. Crane, & E. P. Halstead had severally made answer denying the allegations and equities of the cross-bill of Jane C. Hitz filed herein Oct'r 21st, 1879, in so far as the same in anywise relate to them, the said defendants, or either of them, and the plaintiff in said cross-bill had thereupon filed replications to such answers.

ENOCH TOTTEN,
For the Plaintiff Jane C. Hitz in the Cross-bill.
R. D. MUSSEY,
For the Defendants (to said Cross-bill) Prentiss, Crane, and Halstead.

86 *Stipulation as to Hearing of Case as if Certain Pleadings were Filed.*

Filed Nov. 17, 1880.

In the Supreme Court of the District of Columbia, the 17th Day of Nov'r, 1880. In Equity.

B. U. KEYSER, Receiver, *vs.* JOHN HITZ ET AL. } #6583, Eq. Doc. #19.

Stipulation that case be heard as if certain pleadings had been filed.

It is hereby stipulated that this case may be heard on the papers, pleadings, and testimony now on file herein as if the defendants W. P. Jenks, R. W. Tyler, C. E. Prentiss, E. P. Halstead, and Sarah L. Crane had severally made answer denying the allegations and equities of the amended and supplemental bill filed herein Jan'y 3, 1880, in so far as the same in anywise relate to them, the said

defendants, or either of them, and the plaintiff had thereupon filed replications to such answers.

ELLIOT & ROBINSON,
For the Plaintiff.
R. ROSS PERRY,
For the Def'ts Jenks & Tyler.
R. D. MUSSEY,
For the Def'ts Prentiss, Crane, & Halstead.

87 *Motion for Leave to File Amendment to Cross-bill, &c.*

Filed Nov. 20, 1880.

In the Supreme Court of the District of Columbia.

BENJ. U. KEYSER
vs.
JANE C. HITZ ET AL. } Equity. No. 6583.

Motion for leave to amend cross-bill.

And now comes the defendant Jane C. Hitz and moves the court for leave to file the amendment to her cross-bill heretofore presented to the court and marked "filed" in the clerk's office as of November 13, 1880, and also to remand the said cause to the examiner to take such testimony relating to the alteration of the deed of June 16th, 1877, as mentioned and described in the said proposed amendment as the parties may have to offer, and for reasons assigns the following, to wit:

1. The said defendant did not discover or know any circumstances indicating the alleged alteration of said deed until Saturday, the 13th day of November, 1880.

2. Her counsel did not know of or discover the said alteration until the 12th day of November, 1880, and that the matter of the proposed amendment is material, and that the facts alleged in said proposed amendment could not, with reasonable diligence on the part of herself and counsel, have been sooner introduced into the cross-bill.

ENOCH TOTTEN,
Counsel for Jane C. Hitz.

88 *Affidavits in Support of Above Motion.*

DISTRICT OF COLUMBIA,
County of Washington, } *ss:*

I, Enoch Totten, of the said city of Washington and District of Columbia, being first duly sworn, do depose and on my oath say that I am the counsel for Jane C. Hitz in the above-entitled cause of Keyser *v.* Hitz, being equity, No. 6583, in this court; that I did not discover the apparent alterations and changes in the deed bearing date June 16th, 1877, purporting to be from Jane C. Hitz and

husband to Sarah L. Crane, until in the evening of November 12, 1880, and that I had no reason to and did not suspect that there had been any alteration made in the said deed after execution and delivery until I discovered, on the said evening, the endorsement on said deed, in pencil, in the handwriting of Mr. Hopkins, then of the firm of Ashford & Hopkins, whose handwriting I recognized; that the application for leave to file this amendment is not made for the purpose of vexation or delay, and that the matter of the proposed amendment is, in my opinion, material and could not with reasonable diligence have been sooner introduced into the cross-bill of the said defendant.

I further say that I made diligent search for the said original deed of June 16th, 1877, during the time I was preparing the pleadings in the said cause in behalf of Mrs. Hitz and taking the testimony in the cause, and I was unable, after diligent search and inquiry, to ascertain where the said deed was or in whose possession it was lodged, and I supposed that the said deed was lost, until on or about the 6th day of October, 1879. At that time the
89 testimony had been proceeding for a long time, and several depositions had been taken. During the examination of one of the witnesses for the complainant Keyser, Mr. Perry, counsel for the defendant Jenks, produced the said original deed and the same was filed as an exhibit to the testimony of the witness Austin. The said deed was, from that time until it was filed in the court, in the custody of the examiner, and my attention was not particularly directed to any peculiarities about the deed.

I further say that I have been frequently urged and instructed by my client to make no delay in bringing this cause to a speedy termination.

I further say that in my judgment the alleged allegations, if proven to have been made, are material, and that I am acquainted with the handwriting of Thomas S. Hopkins, and that in my opinion the endorsement found upon the back of the said deed of June 16th, 1877, written with a pencil, was written by the said Thomas S. Hopkins.

And further deponent saith not.

ENOCH TOTTEN.

Subscribed & sworn to before — this 20 day of Nov., 1880.
R. J. MEIGS, *Clerk*,
By M. A. CLANCY, *Ass't Clerk*.

DISTRICT OF COLUMBIA, }
County of Washington, } *ss*:

Jane C. Hitz, being duly sworn, doth depose and on her oath say that she is one of the defendants in the above-entitled cause,
90 and that her application for leave to amend her cross-bill is not made for the purpose of vexation or delay, and that the matter of the proposed amendment is, as she is advised by counsel and believes, material to her rights in the said proceeding, and that said amendment could not with reasonable diligence, as she is in-

formed and believes, have been sooner introduced into the said cross-bill. She further says that she did not know of the alterations and changes mentioned in her said proposed amendment until November 13th, 1880, when the same were mentioned to her in the office of her counsel; that when the deed was shown to her, during the taking of evidence, she only looked at the signature, and that was all to which her attention was invited. She further says that the said alterations and changes were made without her knowledge or consent.

JANE C. HITZ.

Subscribed and sworn to before me this 20th day of November, 1880.

R. J. MEIGS, *Clerk*,
By M. A. CLANCY, *Ass't Clerk*.

91 *Affidavit of F. W. Jones in Support of Motion for Leave to Amend, &c.*

Filed Nov. 20, 1880.

In the Supreme Court of the District of Columbia.

BENJ. U. KEYSER
vs.
JANE C. HITZ ET AL. } Equity. No. 6583.

DISTRICT OF COLUMBIA,
County of Washington, } *ss*:

Frederick W. Jones, of the District of Columbia, being duly sworn, deposes and says that so much of the testimony in the above-entitled cause as is marked "Volume 1" has been shown to him, and his attention has been particularly directed to a deed bearing date June 16th, 1877, purporting to have been made by Jane C. Hitz and her husband to Sarah L. Crane, and together with an endorsement on the back thereof written with pencil; that he is well acquainted with Thomas S. Hopkins and with his handwriting, and he recognizes the said endorsement in pencil as the handwriting of Thomas S. Hopkins.

F. W. JONES.

Subscribed and sworn to before me this twentieth day of November, 1880.

THOMAS W. SORAN,
Notary Public.

[SEAL.]

92 *Order Granting Leave to File Amendment to Cross-bill, &c.*

Filed Nov. 20, 1880.

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER
vs.
JANE C. HITZ ET AL. } Equity. 6583.

The motion of Jane C. Hitz for leave to amend her cross-bill and to take testimony, supported by the affidavit of F. H. Dorian and others, now coming on to be heard, was argued by counsel and considered by the court. It is thereupon, this 20th day of November, 1880, ordered that the amendment submitted to the court be, and the same is hereby, allowed to be made; that the said amendment be served upon the solicitors of the defendants in the cross-bill on or before Tuesday next, and that they are required to plead thereto within five days from said time; that after said amendment shall be at issue the said Jane C. Hitz shall be allowed six days within which to take evidence in support of said amendment, and the defendant four days to reply thereto, and that three days be allowed to said Jane C. Hitz for rebuttal.

The costs of the applications for the leave to file said amendment to said cross-bill and the examiner's fees for taking the testimony hereby authorized shall be taxed against said Jane C. Hitz.

A. B. HAGNER,
Asso. Justice.

Nov. 20th, 1880.

93 *Order Granting Leave to Lithograph Deed.*

Filed Nov. 26, 1880.

Supreme Court of the District of Columbia.

BENJ. U. KEYSER
vs.
JANE C. HITZ ET AL. }

On motion of Enoch Totten, sol'r for Jane C. Hitz, it is hereby ordered this 26 day of Nov., 1880, that the examiner in this cause, E. A. Bailey, be, and he hereby is, authorized to remove the deed from Jane C. Hitz & husband to Sarah L. Crane, dated June 16, 1877, now filed as an exhibit to the deposition of the notary public Austin, and to cause the same to be photographed or lithographed on the request and at the expense of either party to this cause; said deed to be returned to its place as soon as possible.

A. B. HAGNER,
Asso. Justice.

Nov. 27, '80.

94 *Separate Answer of R. W. Tyler to the Amendment of the Cross-bill of Jane C. Hitz.*

Filed Nov. 27, 1880.

In the Supreme Court of the District of Columbia, the — Day of November, 1880. In Equity.

B. U. KEYSER, Rec'r, &c., *vs.* JOHN HITZ ET AL. } # 6583, Eq. Doc. # 19.

The separate answer of R. W. Tyler to the amendment of the cross-bill filed by Jane C. Hitz.

The defendant R. W. Tyler, saving all right of exception, &c., to the amendment of the cross-bill filed by Jane C. Hitz, for answer thereto says:

I have no personal knowledge of the several matters and things alleged and charged in said amendment; but on information and belief I aver the same to be utterly false, and I demand strict proof thereof.

And having fully answered, &c.

R. W. TYLER.

Subscribed and sworn to before me, clerk of the sup. ct. of the Distr. of Col'a, this 27th day of November, 1880, at Washington, D. C.

R. J. MEIGS, *Clerk, &c.*,
By R. J. MEIGS, No., 3, *Ass't Clerk.*

95 *Separate Answer of C. E. Prentiss to the Amendment of the Cross-bill Filed by Jane C. Hitz.*

Filed Nov. 27, 1880.

In the Supreme Court of the District of Columbia, the 27th Day of November, 1880. In Equity.

B. U. KEYSER, Receiver, *vs.* JOHN HITZ ET AL. } # 6583, Eq. Doc. # 19.

The separate answer of C. E. Prentiss to the amendment of the cross-bill filed by Jane C. Hitz.

The defendant C. E. Prentiss, saving all right of exception, &c., to the amendment of the cross-bill filed by Jane C. Hitz, for answer thereto says:

I have no personal knowledge of the several matters and things alleged and charged in said amendment, but on information and

belief I aver the same to be utterly false, and I demand strict proof thereof.

And having fully answered, &c.

C. E. PRENTISS.

Subscribed and sworn to before me, clerk of the supreme court of the District of Columbia, this 27th day of November, 1880, at Washington, D. C.

R. J. MEIGS, *Clerk*,
By M. A. CLANCY, *Ass't Clerk*.

96 *Separate Answer of Sarah L. Crane to the Amendment of the Cross-bill.*

Filed Nov. 27, 1880.

In the Supreme Court of the District of Columbia, the 27th Day of November, 1880. In Equity.

B. U. KEYSER, Rec'r,
vs.
JOHN HITZ ET AL. } # 6583, Eq. Doc. 19.

The separate answer of Miss Sarah L. Crane to the amendment of the cross-bill filed by Jane C. Hitz.

For answer to said amendment the defendant Miss Sarah L. Crane says:

I have no personal knowledge of the several matters and things in said amendment alleged and charged, but on information and belief I aver the same to be utterly false, and I demand strict proof of the same, and I am advised, and on such advice charge, that Mrs. Hitz is estopped from denying said deed, and that, even if the several matters and things in said amendment alleged and charged were true, the said Jenks had no notice thereof, either actual or constructive.

S. L. CRANE.

Subscribed and sworn to, at Washington city, D. C., this 27th day of November, A. D. 1880, before me, clerk of the supreme court of the District of Columbia.

R. J. MEIGS, *Clerk*,
By M. A. CLANCY, *Ass't Clerk*.

97 *Stipulation in Lieu of Answer, &c.*

Filed Nov. 27, 1880.

In the Supreme Court of the District of Columbia, the 27th Day of November, 1880. In Equity.

B. U. KEYSER, Rec'r, vs. JOHN HITZ ET AL. } #6583, Eq. Doc. #19.

Stipulation.

It is hereby stipulated and agreed that this case shall stand for the taking of testimony and hearing as if the defendant E. P. Halstead had answered the amendment to the cross-bill of Jane C. Hitz and replication had been filed thereto.

ENOCH TOTTEN,
For Jane C. Hitz.
R. D. MUSSEY,
For E. P. Halstead.

98 *Answer of John Hitz to Amended Cross-bill.*

Filed Nov. 27, 1880.

In the Supreme Court of the District of Columbia, the 24 Day of November, 1880.

BENJAMIN U. KEYSER, Receiver, vs. HITZ ET AL. } Equity. No. 6583.

To the honorable supreme court of the District of Columbia, holding a special term in equity:

The separate answer of John Hitz to the amended cross-bill, by leave of court first had and obtained, filed in the above-entitled cause respectfully represents:

6½. That he knows nothing of the several matters and things set forth and contained in the said amended bill; that his attention was never at any time called to the indorsement upon the said deed mentioned and particularly recited in the said amended bill; that he never saw the same and never heard of it until the said amended bill was filed; that he knows nothing of the alterations or alleged insertions in the said amended bill charged as having been made in the deed from him and his wife to Sarah L. Crane, and does not know when and under what circumstances the same were made; and, further answering, this respondent repeats the denial, heretofore made on his part, of the charge of fraud respecting the execution and acknowledgment of the said deed by the said Jane C. Hitz

in said original bill made and now repeated in said amended
99 bill, and, to the contrary thereof, avers that the said deed was executed and acknowledged by the said Jane C. Hitz in perfect good faith and with full knowledge of its contents and effect, and was a matter of an ordinary business character, free from any circumstance calculated to challenge any particular attention on his part, and was by him treated as such and executed and acknowledged in perfect good faith and in the same manner in every respect and with the same formalities as attended the execution of any other deed.

JOHN HITZ.

I do solemnly swear that I have read the foregoing answer by me subscribed, and know the contents thereof, and that the matters therein stated of my own knowledge are true, and those stated on information and belief I believe to be true.

JOHN HITZ.

Subscribed & sworn to before me Nov. 27, 1880.
R. J. MEIGS, *Clerk*,
By M. A. CLANCY, *Ass't Clerk.*

100 *Answer of W. P. Jenks to Amendment of Cross-bill.*

Filed Nov. 29, 1880.

In the Supreme Court of the District of Columbia, the — Day of ——, —.

B. U. KEYSER, Receiver, &c., *vs.* JOHN HITZ ET AL. } No. 6583, Eq. Doc. 19.

Separate answer of W. P. Jenks to the amendment of the cross-bill of Jane C. Hitz.

This defendant, saving all exception to the said amendment, answering, says:

I have no personal knowledge of the matters and things in said amendment alleged and charged, but on information and belief I aver the same to be utterly false, and I demand strict proof thereof.

I aver that I am a *bona fide* purchaser for value and without notice, actual or constructive, of the several matters and things so alleged and charged.

I am advised, and hence aver, that my rights as such purchaser could not be affected by the said matters and things even if the same were true, and that the said Jane C. Hitz is in equity estopped from setting up the same, and, further, that in respect of the deed assailed by the said amendment she had the same power of conveyance and of contract as she would have had if a *feme sole.*

And having fully answered, &c.

W. P. JENKS.

W. D. DAVIDGE,
Sol'r for Def't.

101 Subscribed and affirmed before me this 27 day of November, A. D. 1880, at Philadelphia, in the State of Pennsylvania.

CHARLES GIBBONS, Jr.,
United States Examiner.

Answer of B. U. Keyser to Amendment to Cross-bill.

Filed Dec. 2, 1880.

In the Supreme Court of the District of Columbia.

B. U. Keyser, Receiver,
vs.
Hitz et al. } Equity. No. 6583.

The answer of B. U. Keyser, receiver, to the amendment to the cross-bill of Jane C. Hitz shows as follows:

That he has no knowledge of the matters & things charged in the said amendment other than the information derived for the first time from the amendment itself, and that he calls for and will abide by the proof thereof.

B. U. KEYSER.

Subscribed and sworn to before me this 29th day of November, 1880.

R. J. MEIGS, *Clerk, &c.*,
By R. J. MEIGS, No. 3, *Ass't Clerk.*

102 *Opinion of Justice Wylie, Delivered, Pending Argument of Cause in Special Term, Tuesday, June* 28, '81.

B. U. Keyser, Receiver, &c.,
vs.
John Hitz et al. } Equity. No. 6583.

(From notes of Harper.)

Justice Wylie:

* * * The cashier of a bank is the superintendent of the bank. Upon the evidence in this I have no doubt in the world, not a particle of doubt, that this whole matter was perfectly understood between Prentiss and Hitz and all the parties who were intrusted with the management of that bank, on the one side, and Mr. Tyler and Mr. Jenks, on the other. Jenks was not to lend his money except upon getting a clear title. The prior encumbrance was to be released. The bank held these notes; they were substantially the notes of Hitz, the president of the bank, and they were made by Chipley and they were payable to Halstead, trustee, but it was perfectly understood that Hitz and his wife had given security for the notes; it was understood that these others were formal names. The real borrower from the bank was Hitz. The bank looked to Hitz, the bank knew Hitz and knew nobody else as the responsible

party to that note. The perfect understanding amongst all these parties was that these two notes were to be paid out of the new loan. One of the notes was overdue, the other was not yet due. There was some interest accrued upon both of them, but as they all agreed when the bank was down somewhat at that time, the bank was in distress for money, was a borrower of money, and as it was the business of
103 the cashier of the bank to manage the bank and prevent its going down if possible, to use the assets in his hands for the best interests of the stockholders, to dispose of these very notes, he had a right, in order to secure the $20,000 for the bank, to accept these other notes or to receive payment of them. I think there cannot be any doubt about this. The business was not carried on with much skill on the part of Tyler or Jenks. The better way for Jenks would have been to purchase the notes, take an assignment of the notes, and that would have left the first security undisturbed. It is a maxim, I think, amongst experienced business men never to disturb a security if you can help it, not to take any new securities in exchange for old ones unless necessary to do so. But as this thing was managed by a couple of rascals, I am not sure but that there was some design in the whole business. It seems to have grown out of their contrivance, because they hunted in couples, and, judging from the testimony in this case, the object was to strip Mrs. Hitz of all her property. Now, these two notes were in the bank; they were under the control of Prentiss; Prentiss had notice and Hitz had notice of the new loan that had been agreed upon, and when the certified check sent by Jenks from Philadelphia came here, for $20,000, it was taken to the bank and there paid by Tyler over the counter of the bank. Well, Chipley was not there, and no party to that note was there. The bank was *prima facie* owner of the note, because it had possession of the note. The party was justified in paying the note there, and, according to the agreement of all parties previously entered into, those notes were to be paid for in that way by
104 this Philadelphia check by Jenks. The check was delivered to the bank, the money was collected by the bank, the notes were held by the bank. Well, by what logic or process can we come to any other conclusion than that the bank was paid for the notes? These notes were paid. Didn't the bank receive the $20,000? Didn't the bank collect the money on that check? Was it not collected by them as a bank? To be sure, Prentiss, the cashier of this bank, got the $20,000 and credited himself with it, but when he got the money he got it as an officer of the bank. He stole the money afterwards by putting it to his own credit. When he collected the money he collected it as an officer of the bank. As an officer of the bank, then, having received payment of the two notes, those two notes became extinguished. They were left in the bank, to be sure; that was a piece of negligence, undoubtedly, on the part of Tyler; but because a man is negligent, because a man trusts the officers of a bank with whom he is dealing, because he believes they are honest, will that be sufficient to throw the loss upon him when they turn out to be rogues? Why, they are

the chosen agents of the stockholders of the bank; the world don't know them, the world has not trusted them. A man goes to the bank and pays his note and don't take up his note he is guilty of negligence, but because he don't take up his note after having paid it will that excuse the bank when the cashier of the bank puts the money in his pocket? The most honest men in the world are negligent. It is persons of a different kind who are not negligent; but is every honest man who is not on the lookout for tricks and frauds to lose his property because when he pays his
105 money a rogue puts his money into his pocket? This case is too palpable, in my mind, in regard to that matter. These parties had control of the paper. They were officers of the bank in dealing with the paper, officers of the bank in receiving payment, and you can't say that they were not officers of the bank when they stole the money. Now, Hitz's conduct in regard to this matter is very remarkable. These Chipley notes were given by Chipley, but Chipley was a "peter-funk," and the endorser was a "peter-funk," and the bank had notice that they were "peter-funks," and that Hitz was the real party, and Hitz and wife gave their deed of trust on this property to secure that piece of paper. A remarkable feature of this case, I think, is that the deed of trust was this: That on payment of the notes, those two notes for $10,000, it was provided that the trustee should reconvey that property, not to Mrs. Hitz, to whom it belonged, but Hitz. Now, it seems to me an important fact which has an important weight in my mind in making up my opinion of the conduct of these two men. This husband, Hitz, and this man Prentiss seem to have been conspirators from the beginning to strip her of her property, and her own husband, in taking her deed of trust upon her own property which had descended from her father, provides in that deed of trust that by the terms of that deed the trustee shall reconvey the property to him and not to her, so that he could get hold of that property himself. It would not have answered the purpose, but that was one of those awkward contrivances which rogues perpetrate, but in which they fail of success.

Another fact which I wish to refer to is this salve, this plaster, which is provided in the $20,000 of the stock of the bank
106 which he thought he ought to give to his wife in consideration of the conveyance of her property. A thought of that kind might have induced him to make this provision in this deed of trust in having it conveyed to him. He was careful not to give her a certificate; how is that? She was a married woman, and he her husband. He transferred the stock or would have transferred it to her name on the books of the bank. The certificates never were delivered to her; she knows nothing about the transaction until the dividend becomes due upon the stock, and then he takes the cashier's check, payable to his wife, and gets his wife to endorse the check, payable to him. Now, in the first place, it shows an action honorable in the wife, and he treats it as his own and takes the dividends, and the whole thing is his. So that the pretext of having given her value for the property was all a sham. How such a man

can face a community of honest citizens it is difficult to understand. In the struggle of life, hand-to-hand conflicts take place and there is a good deal of giving and taking. Sometimes unfair advantages are taken one side or the other, but the world makes allowance for this. But a man who undertakes to cheat his wife and his children, he is unfit for the world, unfit for society. Now, this bank here, after all this transaction, comes in with this bill on behalf of this receiver and files a bill based upon fraud of its own officers and says: "We have got these notes in our possession and they don't seem to have been paid, and we want them paid over again. We want them paid any way, and we insist upon having a prior claim upon this property." If what I have said be true, that in point of fact these notes have
107 been paid, of course there is nothing for this bill to stand upon whatever. Now, it is said that this deed of trust has never been released. It is signed by the two trustees and by Prentiss, the cashier of the bank. He don't sign as a party, because there was no title in him, but he signed an acknowledgment and representing himself to be the holder of the notes, and also signed by the payee of the notes, but he had nothing to do with it. But Prentiss signs the paper and certifies that the notes were paid, and he signs it with his individual name—not, apparently, by the authority of the bank, not in his official character. Well, no judge has gone further than myself in holding these deeds of release to a strict line—a great many releases—and, for one, I always have been disposed to look very narrowly into releases. Well, now, then, there probably may have been an irregularity. If I can safely say that the deed was never released, and that the release is absolutely void, what then? Does that affect the case at all? Why, not in the least. If the notes were paid there ought to have been a release, and a regular one, and a court of equity will regard that as done which ought to be done. If this is not a good release the court will compel the proper parties to make a good release after the notes have been paid. So, in my view, if there is any irregularity in the execution of a deed of trust, it is of no consequence at all.

Now, there is another branch of the case, and for these reasons I do not think it worth while for the counsel on the other side to make their argument. They have nothing to do with the other branch of the case, probably. The most important struggle of
108 this case, I think, is over the cross-bill. I shall dismiss the original bill with costs, and hear you upon the cross-bill. I merely make this declaration to the counsel now, and don't make any order.

You may proceed with the argument on the cross-bill, Col. Totten.

The above judg't pronounced in open court June 28, '81.

109 *Bond of Richard W. Tyler, Receiver.*

Filed Dec. 5, 1881.

In the Supreme Court of the District of Columbia.

B. U. KEYSER, Receiver, &c.,
vs.
JOHN HITZ, JANE C. HITZ, ET AL. } Equity. No. 6583.

Know all men by these presents that we, Richard W. Tyler and W. W. Rapley, are held and firmly bound unto B. U. Keyser, receiver; John Hitz, Jane C. Hitz, and William P. Jenks in the just sum of five thousand dollars, lawful money; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this third (3d) day of November, 1881.

Whereas, by a decree entered in the above-entitled cause, dated November 28th, 1881, it is ordered that upon giving bond in the penal sum of five thousand dollars the said Richard W. Tyler be appointed receiver to take possession of and rent and manage the property referred to in said decree, and to collect the rents and profits thereof, and to apply the same, so far as may be necessary, to the payment of taxes, insurance, and other expenses needed to keep the said property in tenantable condition until the further order of the court, and make report to the court from time to time of the manner of his execution of his trust:

110 Now, therefore, the condition of this obligation is such that if the above-bounden Richard W. Tyler shall well and truly discharge and execute the trust reposed in him by said decree, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue.

RICH'D W. TYLER. [SEAL.]
W. W. RAPLEY. [SEAL.]

Witness:
R. G. RUTHERFORD.

Approved Dec. 5, 1881.
MACARTHUR, *Justice.*

111 *Petition of Benjamin U. Keyser, Receiver.*

Filed Dec. 14, 1883.

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver of the German-American National Bank of Washington, Complainant,
vs.
JOHN HITZ ET AL., Defendants.
} Equity. 6583.

To the honorable the judges of the supreme court of the District of Columbia, sitting in equity:

The petition of Benjamin U. Keyser, receiver, as aforesaid, respectfully shows unto the court:

1. That he is the duly appointed and qualified receiver of the German-American National Bank of Washington, appointed by the Comptroller of the Currency in pursuance of the laws of the United States.

2nd. That he is a creditor by two several judgments against the defendant John Hitz respectively rendered by this honorable court holding a circuit court, one in law case No. 21329 for $29,660.10, with interest and costs as therein specified, and the other in law case 22418 for $23,000, with interest and costs as therein specified.

3. Petitioner is further informed, believes, and avers that the defendant John Hitz, the judgment debtor aforesaid, is utterly insolvent, having no property, real or personal, subject to legal or
112 equitable process for the satisfaction of said judgments, save and except the legal right for his life to the rents, issues, and profits of the real property of his wife, the defendant Jane C. Hitz, to whom he was lawfully married on the 5th day of August, A. D. 1856, and that by reason of the death of her father, the late Michael Shanks, which occurred May 20, 1864, and the birth of several children of the defendants John and Jane C. Hitz, two of said children being now living, and living issue, having been born prior to the passage of the act of Congress commonly known as the "married woman's act," the defendant John Hitz became and was and still is entitled to the rents, issues, and profits of the real property of his wife, the defendant Jane C. Hitz, which vested in her as the sole heir-at-law of her late father, the said Michael Shanks, in the year A. D. 1864.

4. That of the real property which vested in Jane C. Hitz, as aforesaid, and to which the defendant John Hitz is entitled as "tenant by curtesy," are the premises on the corner of 9th and G streets northwest, in the city of Washington, more particularly mentioned and described in the original bill and subsequent pleadings in this cause, and that petitioner, as receiver aforesaid, and under order of this honorable court, has collected the rents of said prop-

erty to the amount of $4,000 and upwards, and deposited the same in the registry of the court to the credit of said cause; and inasmuch as he is advised that said rents are the property of the defendant John Hitz and subject to the satisfaction of his debts, according to their respective legal priorities, he prays:

First. That the defendants John and Jane C. Hitz and
113 the defendants Jenks and Tyler and Sarah L. Crane be served with process in the usual form commanding them to appear on a day certain and show cause, if any they may have why the said rents so deposited, as aforesaid, should not be paid to the petitioner on account of his said judgments against the defendant John Hitz.

Second. That a decree may be passed directing the clerk of this court to pay to petitioner the amount so deposited, as aforesaid, on account of said judgments, and that the same be duly credited thereon according to priority; and,

Third. For such other and further relief in the premises as the nature of the case may require and as to the court may appear equitable and just.

BENJAMIN U. KEYSER.

I do solemnly swear that I have heard read the foregoing and annexed petition by me subscribed, and know the contents thereof; that the facts therein stated on my personal knowledge are true, and that those stated on information and belief I believe to be true.

BENJAMIN U. KEYSER.

Subscribed and sworn to before me this 14th day of December, A. D. 1883.

JAMES H. GRIDLEY,
Notary Public.

[SEAL.]

ELLIOT & ROBINSON,
Solicitors & of Counsel for Petitioner.

114 *Separate Answer of Jane C. Hitz to Petition of Keyser.*

Filed Jan. 21, 1884.

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver of the German-American National Bank of Washington,
vs.
JOHN HITZ ET AL.
} Equity. No. 6583.

The separate answer of the defendant Jane C. Hitz, one of the defendants in the bill of complaint above named, to the petition of B. U. Keyser, receiver, respectfully shows:

1. Answering the first paragraph of the petition, she says that she is advised by counsel and believes, and thereupon avers, that the petitioner is not now and never was receiver of the said national

bank, and that there never was such a corporation as the German-American National Bank of Washington.

2. Answering the second paragraph of the said petition, she says that she does not know whether any such judgments as *are therein* described appear of record as alleged against the said John Hitz, and she therefore calls for strict proof thereof. Further answering the averments in said paragraph, she says she is advised by counsel and believes, and thereupon avers, that if any such judgments do appear against the said John Hitz they are utterly null and void because the said supreme court of the District of Columbia had no jurisdiction to entertain any such causes of action or to render
115 any such judgments against the said John Hitz at the time or times when such actions were brought or such judgments were rendered.

She further says on information and belief that the parents of the said John Hitz were citizens of the Republic of Switzerland, and that the said John Hitz was an alien and was born in the said Republic in the year 1828, and that he was never naturalized and never declared his intention to become a citizen of the United States, and that on the 4th day of March, 1864, the high federal council of the Swiss confederation issued its commission to John Hitz, her husband and one of the defendants in this cause, appointing him consul general of that confederation "for the United States," and "especially for the third district," comprising the District of Columbia and the States of Virginia, Maryland, and Delaware, and that on the 23rd day of September, 1864, said John Hitz was duly recognized by the executive department of the United States as such consul general, and an *exequatur* in due form was executed and delivered to him by the United States, and that he was afterwards and until about the 25th day of June, 1881, recognized as such "consul general" by the United States, and that he continued to perform all the duties appertaining to said public office of said confederation in the United States until the 25th day of June, 1881.

On or about the 28th day of February, 1868, the said federal council of the Swiss confederation issued its credentials or letter of credence, by which it appointed the said John Hitz "political agent" or "agent politique" of the Swiss confederation near the Government of the United States of America, and thereby
116 conferred upon him the title and rank appertaining to that office; that on or about the 2nd day of April, 1868, the said John Hitz was duly recognized as such political agent or *agent politique* by the executive department of the United States, and after that date was so recognized and continued to perform all the duties appertaining to that office in the United States until on or about the 25th day of June, 1881.

The duties appertaining to the said office consisted in the management of all the matters and affairs in the United States, national or diplomatic, commercial or otherwise, appertaining to and concerning the Swiss confederation, and the subjects of said confederation, and in the exercise of a general supervising power and

authority over the consuls, vice-consuls, and consular agents of the said confederation in the United States. The said office of "*agent politique*" or "political agent" at that time was the office *big*best in rank known to or established by the Swiss confederation amongst her representatives in the United States, and the office of consul general is next in rank thereto, and she is advised by counsel and believes, and therefore avers, that said John Hitz was from the said 2nd day of April, 1868, and until on or about the said 25th day of June, 1881, continued to be a public minister within the meaning and purview of section two of article three of the Constitution of the United States, and duly accredited and appointed as such from the Swiss confederation, a foreign power and government, to the Government of the United States, and that said John Hitz, from said date, was recognized as such public minister in the United States by the Government of the United States until on or about the said 25th day of June, 1881.

117 At the time when the promissory notes and other evidences of debt were made upon which said actions at law were based, and at the time when the said actions at law were instituted, as well as when the judgments thereon were rendered, the said John Hitz was the chief representative in the United States of the Swiss confederation, and such public minister, as aforesaid; and she is advised by counsel and believes, and thereupon she avers and charges, that said Hitz was not subject to any jurisdiction or suable in the supreme court of the District of Columbia in manner and form as appears in said actions at law, and that said alleged judgments at law, if they appear of record as alleged in said bill, are null, void, and of no effect.

She is advised by counsel and believes, and thereupon says, that by virtue of the provisions of the Constitution of the United States original and exclusive jurisdiction over all cases affecting embassadors, other public ministers, and consuls is vested in the Supreme Court of the United States, any statute to the contrary notwithstanding.

Further answering the said paragraph of said bill, she says upon her information and belief that a large number of the promissory notes and other evidences of debt upon which said alleged judgments at law were rendered were given by the said John Hitz for the sole benefit of the said German-American national bank whilst he, the said John Hitz, was president and one of the managers of that institution, and that it will be inequitable and unjust for the said complainant to recover out of the property any part of said debts which of right are the debts of the German-American national bank.

118 3. Answering the averments of the third paragraph, this respondent says that she believes that the said John Hitz is insolvent. She admits that she was married to the defendant John Hitz, as alleged in said paragraph, and that she had children, as alleged, but upon the advice of counsel and belief she denies that the defendant John Hitz became and still is entitled to the rents,

issues, and profits of her real property inherited by her, as therein stated.

4. She admits that the property, as described in the fourth paragraph, is correctly set forth, but, upon the advice of counsel, she denies that John Hitz has or had at any time subsequent to the date of the passage of the said "married woman's" act any tenancy by courtesy or any interest otherwise in her said real estate.

Further answering the said paragraph, this respondent is advised by counsel and believes, and so believing avers, that by the decree in this cause made by the general term of this court on the — day of December, 1883, the rights of this respondent to the rents, issues, and profits of the said property whilst in the hands of the said Keyser is declared and established, and that from said decree and all its provisions this respondent has taken and perfected an appeal to the Supreme Court of the United States, and has filed a supersedeas bond, duly approved according to the statute in such case made and provided, and she submits, therefore, that this court is without jurisdiction to dispose of any part of the said fund without her consent.

5. Further answering, this respondent says that the said John Hitz never took possession of any of her property so inherited by her otherwise than as her agent and in subordination to her
119 authority, and that separate accounts were always kept of her property as distinguished from his property, and that he has never asserted any authority in his own right or by virtue of his marital relations over any of her property, either personal or real.

She is informed and believes, and therefore avers, that the promissory notes and other evidences of debt upon which the alleged judgments at law were procured were made by the said John Hitz during the year 1878 and not before.

And, having fully answered, this respondent prays to be hence dismissed, with her reasonable costs and charges.

JANE C. HITZ.

ENOCH TOTTEN,
Sol'r for Mrs. Jane C. Hitz.

DISTRICT OF COLUMBIA, *ss:*

I, Jane C. Hitz, being first duly sworn, do depose and say that I am the respondent in the above answer by me subscribed; that I have read the same and know the contents thereof; that the facts therein stated on my own knowledge I know to be true, and as to those matters and things stated on information and belief I believe them to be true.

JANE C. HITZ.

Subscribed and sworn to before me this 21 day of January, A. D. 1884.

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR., *Ass't.*

120 *Answer of Richard W. Tyler to Petition of Benjamin U. Keyser, Receiver.*

Filed Feb. 5, 1884.

In the Supreme Court of the District of Columbia, the 5th Day of February, 1884.

BENJAMIN U. KEYSER, Receiver, etc., vs. JOHN HITZ ET AL. } In Equity. No. 6583, Doc. 19.

The answer of Richard W. Tyler to the petition of Benjamin U. Keyser, receiver.

1. This defendant admits the facts stated in the first paragraph.

2. He has no personal knowledge of the facts stated in the second paragraph, but believes them to be true.

3. He has no personal knowledge of the facts stated in the third paragraph, but believes them to be true.

4. He believes that the property mentioned in the fourth paragraph is part of the real estate in which the said John Hitz became tenant by the curtesy and entitled to the rents and profits for life; and he is advised that the title of the said John Hitz as such tenant, *and* to the said rents and profits having vested before the passage of the "married woman's act," was not thereby divested. He further says that whether the title of the said John Hitz be as claimed in the said petition, or whether the effect of the "married woman's act" was to divest such title and

121 vest the same in the said Jane C. Hitz, the wife, the conveyances in the proceedings mentioned from the said John Hitz and Jane C. Hitz to Sarah L. Crane, and from the latter to this respondent in trust to secure William P. Jenks, conveyed to this respondent all the right, title, interest, and estate of the said John Hitz and Jane C. Hitz, his wife, in and to the premises mentioned and referred to in the fourth paragraph of the petition, and that according to the true intent and meaning of the said conveyance to this respondent the rents and profits of the said premises became security for the debt of the said William P. Jenks, with interest and costs, and vested in this respondent, as trustee, from the time when default was made under the said deed of trust; and this respondent further says that such default was made on the — day of ——, as set forth in his answer to the original bill in this cause, and that the property conveyed by said deed of trust, owing to the obstructions to the enforcement of the said deed of trust interposed by the petitioner and the said Jane C. Hitz and the large amount of taxes which have been allowed to accumulate and are now in arrear, will not yield a sum sufficient to pay the debt of the said William P. Jenks, with interest and costs, and that this respondent claims that the said rents and profits from and after the said default are part of the security belonging to the said William P. Jenks. This respondent further

says that by the decree made in this cause on the 11th of December, 1883, the same was retained for the purpose of taking an account of the rents and profits received and which should have been received by the petitioner both before and since the decree in special
122 term, and the further purpose of enabling the parties claiming the said rents and profits to litigate their respective claims, as by reference to the said decree will fully appear, and that this petition, wherein before such account the petitioner proposes to litigate in relation only to the portion of the said rents and profits received by him under the order in special term dated the 15th of December, 1881, is an evasion of the said decree, and he is advised that an order should be passed for the taking of the said account and requiring the petition to be amended so as to conform to the said decree, and he prays that such an order may be passed, and as in duty, etc.

RICHARD W. TYLER.

I do solemnly swear that I have read the foregoing answer by me subscribed; that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

RICHARD W. TYLER.

Subscribed and sworn to before me this 5th day of Feb'y, 1884.

ALBERT HARPER,

[SEAL.] *Notary Public, D. C.*

123 *Motion for an Order for an Account and for Distribution by Auditor.*

Filed Oct. 30, 1884.

In the Supreme Court of the District of Columbia, Sitting in General Term, October Term, 1884.

BENJAMIN U. KEYSER, Receiver, *vs.* JOHN HITZ ET AL. } Equity. 6583.

Now comes the defendant Jane C. Hitz, by her counsel, Enoch Totten, and moves the court for an order referring this cause to the auditor to state the accounts of Benjamin U. Keyser for rents which have been collected or which might have been collected by him out of and on account of the premises mentioned and described and involved in the proceedings in this cause, as well before the order of December 15th, 1881, passed by the special term in this cause, as after said order and until the possession of said property and premises passed out of his hands, and to state the said accounts, as well in respect of moneys by him paid into court as the moneys remaining in his hands, and to make such allowances as may be proper.

And also that said Benjamin U. Keyser be directed to appear before said auditor, at such time and times as may be appointed

by said auditor, and bring with him such accounts, books, papers, vouchers, and documents as may be in his possession or under his control, to enable said auditor to properly state said acounts,
124 and also that said auditor be directed to distribute according to law such funds as may be found for distribution in the cause.

ENOCH TOTTEN,
Counsel for Jane C. Hitz.

125 *Testimony Accompanying Auditor's Report. Filed March* 31, 1885.

DECEMBER 5TH, 1884.

Hearing pursuant to adjournment.
Present: B. U. Keyser, in person, and R. D. Mussey, Esq.

Mr. KEYSER sworn and is examined by Mr. Mussey with reference to the receiver's account heretofore filed:

Q. Please state whether this account is a true and correct account of the rents of the 9th and G Streets property, so called. A. It is.

Q. State whether about the 30th of October, 1878, you were acting as receiver of the German-American national bank under appointment by the Treasury Department, and whether you are still so acting. A. I was and am.

Q. As such were you and are you in receipt of a regular salary or annual allowance? A. I was and am.

Q. I notice in this account sundry items of commission of 10 per cent. for which you claim credit. What are they for and to whom were they paid? A. After the failure of the bank, John Hitz, who had been collecting the rents, instructed his agent, John Sherman, to turn them over to me. This was early in November, 1878. John Sherman had been in the habit of receiving from Hitz for his services a commission of 5 per cent. on his collections. The services of Sherman continued at the same rate of commissions, and I have charged for my own services and responsibility and advice
126 a further commission of 5 per cent., it being a duty extra and beyond my regular duties as receiver of the German-American national bank.

Q. During the time you were in possession of this property, did you make any payment on account of taxes? A. I did not.

Hearing adjourned, subject to notice.

WEDNESDAY, *January* 31*st*, 1884.

Hearing pursuant to adjournment.
Present: Col. Totten, of counsel, and Mr. Keyser, a witness.

Mr. B. U. KEYSER, being recalled, produces the vouchers in support of his accounts heretofore submitted to the auditor, and is thereupon interrogated by Col. Totten, counsel for Mrs. Hitz:

Q. You have in your hands, Mr. Keyser, a package of vouchers. Are you ready to submit those to the auditor for his examination? A. I am.

Q. Are those in support of the account which you have rendered? A. They are.

Q. Are they each and all of them just and true? A. Each and all of them are just and true.

127 Q. What is the condition of the fund in your possession—you have part of it in the hands of the court. All that was collected by you under the order of Judge Wylie, special term, authorizing you to collect the money, is in the hands of the court? A. Yes, sir.

Q. Where is the rest of it? —. The rest of it is in the hands of the creditors of the German-American national bank.

Q. In what way? A. It was turned in to the Controller of the Currency of the Treasury of the United States and has been actually distributed.

Q. Controller of the Currency? A. Yes, sir.

Q. Are you sure of that fact? A. Perfectly. It is an actual fact.

Q. By what authority did he do that, do you know? A. It was his duty to distribute all funds that come into his hands.

Q. Why do you say so? A. The law makes it his duty.

Q. The money to which you refer was the amounts collected by you out of that property on the corner of 9th and G, in controversy in this case? A. Yes, sir.

Q. Between the time when you got possession of it from John Hitz and the time Judge Wylie required you to go to the court, that, you say, has been distributed by the Controller of Currency? A. I say so.

128 Q. Then out of what money is this balance found due in your hands to be paid? You report a balance here of some several thousand dollars? A. That is in the hands of the court.

Q. That amounts to how much, according to your account? A. I don't recollect.

Q. Between five and six thousand dollars? A. I think so.

Q. How far back do your accounts go? A. My accounts commence—the first collection is December 9th, 1878.

Q. That runs down now to what period? A. That runs down to February, 1881.

Q. Then why hadn't you closed the account there? A. I didn't close it here; I just left it open to show the amounts of the collections. The balance between this and the amount of disbursements was remitted to the Controller of the Currency.

Q. What was the balance? A. $6,067.

Q. That is, between December, 1878, and February, 1881? A. Yes, sir.

Q. You collected on this property about $6,000? A. Yes.

Q. And handed it over to the Controller of the Currency? A. Yes, sir; I did.

129 Q. And he then distributed that to the creditors of the bank? A. Yes, sir.

Q. Have you any control over that money? A. No, sir.

Q. Or any other money in lieu of it? A. I have not.

Q. How are you to pay a judgment or a decree against you col-

lected between December 8th and February —, 1881? A. That is a conundrum.

Q. Which you are not prepared to answer. How much money has the German-American national bank gotten now to its credit through its receiver? A. Nothing; it is in debt.

Q. Absolutely nothing? A. Absolutely nothing.

Q. Was the Controller of the Currency aware of the fact that this property was in controversy? A. I don't remember that he was.

Q. You instituted this bill originally yourself? A. Yes, sir.

Q. Where is your authority? A. I presume it is in my possession.

Q. I shall have to ask you to produce it at our next hearing. A. I think I have such written authority.

Q. When was this $6,000 and odd dollars deposited by you? A. As collected; with my other rents.

Q. From time to time? A. From time to time.

130 Q. With other rents? A. Yes, sir.

Q. Was there any memoranda made by you touching the fact that there was a controversy in regard to this property? A. No.

Q. Did you assume that they belonged to the creditors of the bank? A. Yes, sir.

Q. That you had a right to distribute it in this way? A. Yes, sir.

Q. What part did you have in making this distribution, if any? A. I was the mere agent of the Controller of the Currency in paying the dividends by his checks; it was deposited in the U. S. Treasury, and he gave me his checks to pay the dividends. I would like to say here that I distributed these rents as the property of John Hitz coming into my hands by his direction. I have so stated before and I gave a history of how I came into possession of these rents.

Q. What directions did you have from John Hitz? A. John Hitz, being indebted to the bank actually and in —, I think you lawyers call it, handed over to me all of his own property to secure his indebtedness to the bank as a shareholder, and among other property he handed me he directed John Sherman, who had previously collected the rents for him, to turn them over to me, and so informed me that he had directed Sherman to turn those rents over to me, and Sherman did so, as the property of John Hitz, and

131 have been credited to John Hitz on his individual liability.

Q. All of it? A. All of it down to this point.

Q. To what dates? A. February 1st, 1881. The balance I haven't credited to him because I have not got them. They have been turned into court.

Q. Now, was John Hitz' direction to you in writing or verbally? A. He did not give me any directions; he gave John Sherman directions to pay these rents to me, and so informed me verbally, with a memoranda of the rents.

Q. Did you have any directions from Mrs. Hitz at all? A. I have none—no—nor any protests from her.

Q. She had no information about it, did she? A. Not that I know.

Q. Well, you are aware that Mrs. Hitz filed a cross-bill in this case? A. Yes, sir.

Q. And that she made a fight, more or less vigorous, about it? A. Yes, sir; I recollect that.

Q. Well, now, on the 10th of January, or about that time, 1874, you filed a bill in this court in this case, which is the original bill to stop Jenkins from selling this property under the deed of trust? A. Yes, sir.

Q. You at that time were required, prior to getting your injunction order as a necessary precedent, to give bond for dam-
132 ages, were you not? A. I believe so.

Q. Who signed that bond? A. I don't recollect.

Q. Where is the bond? A. In the court papers, I presume.

Q. Do you not remember who signed that bond? A. I signed the bond, of course.

Q. As receiver? A. Yes, sir.

Q. Who signed it as surety? A. Nobody that I know of. I think there was no surety to it; I am not positive about that.

Q. Upon the filing of the bond, whatever it may be, your restraining order was issued by Judge MacArthur, was it not? A. I don't recollect.

Q. And that stopped the proceedings to sell? A. For Jenkins, yes.

Q. Did this money that you paid over Dec., 1878, collected between that time and Feb., 1881, was it all collected by John Sherman? A. Every dollar.

Q. Then John Sherman continued in charge of the property as the agent for collecting rents under your administration in the same way that he had done prior to that time? A. Precisely.

Q. Have you no knowledge whether Mrs. Hitz had anything to do with that transaction of turning over the collection of rents to him or not? A. I have not.

133 Q. And all that you have from John Hitz himself was verbal? A. Yes, sir; he had informed me that he had directed John Sherman to pay those rents to me.

Q. And John Sherman did so? A. He did so.

Q. And you received them? A. And I received them.

Q. And you turned them over to the Controller of the Currency? A. I turned them over to the Controller of the Currency.

Q. And when you got them paid you gave him credit to the German-American national bank on his debts? A. Yes, sir.

Q. And sent the money to the controller? A. Yes, sir.

Q. And the money became the property of that bank? A. Yes, sir.

Q. And that's the end of it? A. Yes, sir; so far as I know.

Q. Do you think you can furnish us with the authority from the Controller of the Currency to institute these proceedings? A. I think it possible.

Q. Well, he *did* write you a letter directing you to do so? A. I think he did.

Q. If he did you have got that letter or order of record in the Treasury? A. No; it is not in writing; it was oral. I have

134 it in his handwriting.

Q. Did you not have some written instructions and directions from the Controller of the Currency about this fund and about the disposition thereof—in other words, telling you what to do with them and how to preserve it from the Controller of the Currency at the time the security was required by the special term as a preliminary to issuing the restraining order against Jenks? A. That I don't recollect.

Q. Well, I will tell you. My recollection is that he did give some directions to husband this money and to hold it up for the purpose of answering any disposition the court might make about it and any orders the court might make in reference to its disposition. Do you remember that? A. You are perfectly correct, except that that instruction was with reference to my becoming an officer of the court.

Q. Under Judge Wylie's order? A. Yes, sir; that was the instruction from the department to keep that separate and pay it into the court as required, and I was authorized to enter into a bond as receiver with that condition. That condition I have observed. You will understand that I answer negatively your first question?

Q. You deny there was any instruction given you in regard to the disposition of these rents at all by the special term of this order authorizing you to collect the rents and requiring you to turn them over to the court? A. Yes, sir.

135 Q. All that was done by you with reference to the collections prior to that time was done without any instruction? A. That is my recollection.

Q. Now, how much money have you collected since that date in February, 1881? A. I have collected $5,110.44.

Q. How much is the balance shown by that account? A. $3,963.08.

Q. That is the balance remaining, and that is in the hands of the court? A. Yes, sir.

Q. And the other money prior to that is "gone where the woodbine twineth"? A. It "are."

Q. When you were appointed receiver of this money, fund, did you have a bond? A. I did.

Q. Who signed it? A. That is a bond given by Wm. G. Metzerott and John S. McKelson McClelland.

Q. The whole is insolvent, isn't it, beyond any question? A. No, sir.

Q. Metzerott is dead? A. Yes, sir. When I say John C.—is not insolvent, because I think he is not insolvent.

Q. Well, that is bordering on that condition? A. Yes, sir; verging.

Q. He is very old and feeble? A. Yes, sir; and has the rheumatism.

136 Q. Did Mr. Sherman collect all these rents for you? A. I think he collected every dollar of it.

Q. From before February or after? A. Entirely.

Q. And he was allowed 5 per cent. by you? A. Yes, sir; and I charged an extra 5 per cent. for my care and superintendency.

Q. You were acquainted with the contents of Mrs. Hitz' answer to this bill, and also her cross-bill, were you not? A. I heard of it at the time; yes.

Q. Has the German-American national bank any assets left? A. It has one piece of property.

Q. Where is it located? A. It is No. 1317 K street southeast.

Q. Is that what was known as John Hitz' residence? A. No, sir.

Q. Do you know the number of the lot and square? A. No, sir. I have given you the number.

Q. The title is in whom? A. Me; the receiver.

Q. It was one of those pieces of property conveyed by John Hitz? A. No, sir. It is a piece of property that was conveyed to me by a man named George A. Scott, it having been pledged to the bank as security for a note. It is the remnant of that property.

Q. How much is the property worth that you hold? A. I should suppose $500 a year.

Q. Not more? A. No more.

137 Q. Does that constitute the entire sum of the assets that belong to that bank, now? A. With the exception of some little odds and ends of furniture—probably a $100 worth; not much more.

Q. The collections are pretty much all made, are they? A. Yes, sir. I might say here that I have a case in the interest of the creditors of the bank amounting to some $5,000, which is in the hands of William F. Mattingly in the shape of a suit against Thos. L. Tullock as collector of internal revenue. The Commissioner of Internal Revenue taxed that bank $5,000 on its deposits. The money was paid. Commissioner number 2 following, reviewing the case, decides that the payment was erroneous; that the bank was not liable — figure on deposits, and the money was refunded. Commissioner number 3 comes in and says number 2 is wrong and number 1 right, and that the money must be paid. It was paid under protest, and the bank has been suing ever since to get that money back, and it has never come to trial.

Q. Where is it pending? A. In this court.

Q. What is the title of the case? A. It is the German-American National Bank against Thos. L. Tullock, or somebody substituted in his place; I have forgotten who.

As to the authority to institute these proceedings, Mr. Keyser states that he "conversed with the controller, and that he orally sanctioned the commencement of that suit a year ago; authorized the employment of my attorney because that was the first suit I had—

138 I think the very first. The employment of the attorney was sanctioned by letter."

Q. You have that letter? A. O, yes; I have the letter. I

will look at it, and if there is anything in it which authorizes the suit to be commenced you shall have it.

Q. It authorizes you to employ Messrs. Robinson & Elliott? A. No; Elliott, as my general attorney.

SATURDAY, *January* 31*st*, 1885.

Hearing pursuant to adjournment.

Present: Col. Totten and Mr. John Sherman, a witness.

JOHN SHERMAN sworn and examined—

By Col. TOTTEN:

Q. What is your name? A. John Sherman.

Q. What is your business? A. Real estate.

Q. How long have you been engaged in that business? A. Since the spring of 1876, I guess.

Q. Did you have anything to do, prior to 1878, with the property on the corner of 9th and "G" streets northwest, involved in this controversy? A. Prior to 1878?

Q. Yes, sir. A. I think not prior.

Q. 1878? When was the first time you took charge of it?

139 When did you first take charge of it? A. My recollection is that it was in the spring of 1878——

Q. You were in charge of it when the German-American bank failed? A. Yes, sir.

Q. It failed on the 30th of October, 1878? A. About that time.

Q. For whom were you collecting the rents at that time? A. John Hitz.

Q. John Hitz or his wife? A. John Hitz.

Q. Were you collecting rents—— A. You asked me—at the time of the failure?

Q. Yes. A. Well, I will say that was in October.

Q. On the 30th day, I think. A. Yes, sir. I think probably I paid the rents for October to Mrs. Hitz.

Q. About the time of the failure of the German-American national bank was there any change in the arrangement, so far as you were concerned, as to the disposition of the rents? A. I ought to be correct about the month. It was October 9th. My impression is it was October that I paid Mrs. Hitz. The date is so close together it is little hard to speak correctly. My impression is, however, that the rent prior to the failure—no, no, no. I think I will change that. At the time of the failure, I think, I was paying

140 them to Mr. Hitz.

Q. Then what did you do? A. There was one month during which I paid to Mrs. Hitz.

Q. What month was that? A. I think it was the month of November.

Q. Then, some time about the 1st of November the property was turned over by John Hitz to Mrs. Hitz, was it? A. Well, I wouldn't like to say it was the 1st of——

Q. Well, about that time? A. Yes, sir.

Q. The day is fixed, I think, in this record? A. Yes, sir.

Q. It was soon after the failure of the bank, wasn't it? A. Yes, sir.

Q. Well, you have had a good many other pieces of property for which you were collecting rents for Mrs. Hitz? A. Not now.

Q. Didn't Mr. Hitz turn over the Metzerott hall at the same time and paid money to Mrs. Hitz and not to him? A. I couldn't say it was just at that time. I thought there was a difference in the time.

Q. It was the earlier? A. I think the 9th and G property——

Q. That was the first? A. Yes, sir; that is before the Metzerott hall.

Q. Now, have you attorned to her for the property on the corner of 9th and G streets in controversy? How long did you

141 keep it for Mrs. Hitz? A. I think it was one month.

Q. Well, what did you do with it? A. Paid it to Mr. Keyser.

Q. Now, I wish you would state as distinctly as you can by what authority you began to attorn to Mr. Keyser and at what date. A. I couldn't give you the date exactly without looking at the books, but my impression is I began with the month of December to pay to Mr. Keyser, and my impression is upon direction of Mr. Hitz.

Q. Mr. Hitz? A. I think it is.

Q. Did you have your directions in writing or verbally? A. Verbally is my impression.

Q. Verbally from Mr. Hitz? A. My impression is it was the verbal direction of Mr. Hitz.

Q. Well, did you ever get any authority from Mrs. Hitz to turn it over at all, that you know of? A. I don't remember that I did.

Q. Can you state whether the authority from Hitz was in writing or verbally? A. I think it was verbal.

Q. You searched for the written authority and do not find it? A. I have.

Q. Have you made diligent search? A. Very careful search.

Q. Did Hitz give you this direction (if he gave it to you)

142 in your office or where? A. That would be hard to say. Until the bank failed I met him frequently in the bank, but, as this was afterwards (after the failure), I would not have met him then, and it was an accident if it was anywhere else but in my office.

Q. Well, ever since that time, did you attorn to Keyser? A. For the 9th and G Street property?

Q. Yes. A. During the time it was in my possession I did.

Q. When was it taken out of your possession? A. That is more than I can say, without referring to the books.

Q. Well, about when? A. Two months ago.

Q. By whom? A. By direction of Mr. Keyser.

Q. But that was after the time Mr. Tyler took possession of it? A. Yes, sir.

Q. The receiver. You kept charge of that property and attorned to Keyser from whatever date it was in 1878 down to the time that

Tyler got possession of it? A. Yes, sir; it passed from me to Tyler.

—. This is getting in this suit. Of course, you cannot state here how much money you paid to Keyser, but all the money you got out of the property you paid over to him? A. That is correct.

Q Is that governed by his process in the matter of collecting the rents? A. Yes; that I find in writing.

143 Q. Have you had any conversation with Keyser lately about it? A. I have.

Q. When? A. I met him one day incident-ly at Metzerott's store——

Q. Whose? A. Metzerott's.

Q. The music store on Pennsylvania avenue? A. Yes, sir; and he twitted me about the matter some way or other; I forget just now——

Q. What did he say? A. Let me see. It is hard to say just what he did say, but jocularly asked me "how it was about 9th and G," I think, or something of that kind, or "how it was about Mrs. Hitz' property on 9th and G," or something like that.

Q. Well, he was talking about the rents, wasn't he? A. Yes, sir; and then, as he had opened the question, I asked him, what I wanted to do before, but what I had not felt at liberty to do, what authority I had in regard to my transaction in the matter.

Q. What did he say? A. He said it was from Mr. Hitz.

Q. Well, what did he say about the money which you had paid over to him? Did he tell you what became of it, what he did with it? A. He either did at that time or subsequently speak of having paid the money into the Treasury of the United States or to the Treasurer of the United States.

Q. Did he tell you what became of it? A. I cannot say,

144 Col., that he did. No; I wouldn't say.

Q. Did he say anything about having "got ahead of Mrs. Hitz at last in one thing"? A. No.

Q. He did not? Did he regard it apparently as a good joke that he had got away with this money—got it into the hands of the creditors? A. No; it did not strike me so.

Q. How did it strike you? A. That he had put it beyond his control, and that taken in connection with my knowledge of the fact that it was now beyond his control.

Q. He regarded that as a good joke on Mrs. Hitz, did he not? A. No; he did not put it in that light, Col.

Q. If he did, I want to know it. A. No; I did not think there was any such remark made or anything like it.

Q. Did he say anything about the condition of the case, so far as he was concerned, his authority as receiver, to you? A. No, sir.

Q. He made no jocose remarks about that; did not touch on the subject at all? A. I don't think he did refer to it at all.

Q. Well, that is about all I want to ask you. A. I merely wish to qualify as to dates there. It may have been a few days either way. You asked me just when it was, November or December.

Q. You had the property in charge for Mrs. Hitz at the
145 time you turned it over to Mr. Keyser? A. That is my understanding about it.

Q. Your recollection is that you turned it over to Keyser because Hitz told you to? A. I cannot say that is my impression, Col. I may arrive at it by way of argument; but it is my impression that at the time there was considerable going on. My impression is that it was a verbal direction by Mr. Hitz. I cannot recall, but it conforms to the case, and I may arrive at that impression by way of argument—thinking it over—supposing I would do so; but it is my impression Mr. Hitz gave me verbal direction first as representing the property himself. Afterwards he delivered some to Mrs. Hitz, and that is the whole list of property he gave me when he went to Europe. He gave me a list of the property to collect; and then when he directed me after these troubles to pay some to Mrs. Hitz some still went from him for several years.

Adjourned to Tuesday at 1.30 o'clock.

TUESDAY, *February 4th*, 1885.

Hearing pursuant to adjournment.

Present: Col. Totten, for Mrs. Hitz, and Mr. R. D. Mussey, Esq., for John Hitz.

JOHN HITZ sworn and examined—

By Col. TOTTEN:

146 Q. What is your name? A. John Hitz.

Q. Are you the same John Hitz who testified in this cause long ago, before the final judgment of the courts upon it? A. I am.

Q. You are acquainted with the property on the corner of 9th and G streets, are you not? A. I am.

Q. Can you state to the auditor at what date you turned the property over to your wife, Jane Hitz, or, rather, at the time when you ceased to collect the rents or have anything to do with it, the rents for that property? A. If my memory serves me right, it was in the month of October or November; at all events, in the latter part of 1878.

Q. Well, how long after the failure of the German-American national bank did you do this? A. That I am unable to say at present.

Q. Was it long after? A. The question before, "long after" did I cease to collect the rents?

Q. Yes, sir. Did you cease to collect the rents a long time after the failure of the bank, or a short time? A. Very short.

Q. Very short. Well, a week or two weeks? A. Within a month.

Q. Yes. Who collected the rents for you immediately after you left your control of the property? A. The rents were usually collected by John Sherman.

Q. Did you give John Sherman any instructions, in writing or verbal, as to the person to whom he should attorn? A. I
147 am unable to say; I usually did so in writing; it is an exceptional thing if I did so verbally.

Q. Mr. Keyser, in testifying here in this matter, stated substantially that the property or the possession of it was turned over to him by you personally. Do you know anything about that? A. I don't remember the circumstances of his getting possession of that property. At the time I was without legal advice.

Q. Well, if you turned the property over to Mrs. Hitz or told Sherman to attorn to her, would it refresh your memory to consider that in connection with this question I just asked you? A. Just state that again.

Q. You have stated that in your testimony just now you ceased to collect the rents of this property and had nothing more to do with it after a short time subsequent to the failure of the bank, and that John Sherman was to attorn to Mrs. Hitz. Now, that being so, would you have turned it over to Keyser? A. It is possible that I may have turned it over to Keyser, but it is not probable that it was done without some paper of writing.

Q. Have you made any search for any such paper? A. I have.

Q. With what success? A. I have found no paper of the kind. The only paper I found relating to the transfer of rents was from Mr. Keyser to Mr. Sherman; but my usual habits in such matters would lead me to believe that if I gave authority under the
148 circumstances I would have given it in writing to Keyser, upon which he based his letter to Mr. Sherman.

Q. Will you look at that paper and see if that is your genuine signature?

(Hands witness paper.)

A. That is my signature.

Q. You executed that paper and delivered it, did you? A. Yes, sir.

Col. TOTTEN: I offer that in testimony, Mr. Auditor.

Paper is marked Exhibit John Hitz No. 1.

Col. TOTTEN: I offer two other deeds in evidence. One is a deed from John Hitz to Enoch Totten, and the other is a deed from a man by the name of Richard R. Tyler to Seth Colwell, which is a conveyance made in pursuance of a sale purporting to have been made under a deed of trust.

Papers marked Exhibits A and B (auditor's exhibits).

JOHN HITZ.

149 *Exceptions of Jane C. Hitz to the Report of the Auditor.*

Filed Apr. 7, 1885.

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver,
vs.
JOHN HITZ ET AL. } Equity. No. 6583.

Exceptions in behalf of Jane C. Hitz to the report of the auditor in the above-entitled cause, filed on or about March 31st, 1885.

The said Jane C. Hitz excepts to the said auditor's report as follows:

1. The said auditor erroneously charges upon and against the fund in the registry of the court all the expenses of the said audit and the clerk's costs.

2. The said auditor erroneously charges upon and against the said fund in the registry of the court the taxes for the years 1882 and 1883, with interest.

3. The said auditor does not award and distribute to the said Jane C. Hitz the whole amount of the rents, issues, and profits collected by the said complainant, Benjamin U. Keyser, but erroneously leaves undistributed the amount collected by the said Keyser prior as well as subsequent to the order of December 15th, 1881, to which amount said Jane C. Hitz is entitled, and which should have been awarded by the said report to her, undiminished by any charges for taxes or otherwise.

ENOCH TOTTEN,
Counsel for Jane C. Hitz.

150 *Exceptions of William P. Jenks to the Report of Auditor.*

Filed Apr. 27, 1885.

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver,
vs.
JOHN HITZ, WILLIAM P. JENKS, ET AL. } In Equity. No. 6583, Doc. 19.

The defendant William P. Jenks excepts to the auditor's report filed in the above-entitled cause on the 31st of March, 1885:

1. For that the auditor has not charged the complainant with the rents collected prior to December 15, 1881, the date of the decree in special term.

2. Because of the allowance to the complainant of ten per cent. commission upon the said rents.

3. Because the auditor has not applied the said rents or any of them either to the debt of this exceptant or to taxes upon the property held as security.

4. Because the auditor has not applied the fund in court, or any part, to the debt of this exceptant.

5. Because the auditor has not applied the said fund to the payment of taxes upon the property held as security, except only such taxes as accrued after the decree in special term.

6. Because of the allowance to the complainant of a commission on account of the collection of the fund in court.

151 7. Because of the finding that after the payment out of the fund in court of the items mentioned in Schedule D the balance of $2,804.56 should be paid to Jane C. Hitz.

8. Because of other errors apparent on the face of the report.

W. D. DAVIDGE,
Sol'r for Exceptant.

Exceptions of B. U. Keyser to Report of Auditor.

Filed Jun- 19, 1885.

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver, &c., *vs.* JOHN HITZ, JANE C. HITZ, ET AL. } In Equity. No. 6583, Doc. 19.

The complainant, Benjamin U. Keyser, receiver, &c., excepts to the auditor's report filed in the above entitled cause on the 31st of March, 1885:

1st. For that the auditor has not applied the fund in court, or any part thereof, to the debt of complainant ascertained by judgment, as stated in his petition heretofore filed in this cause.

2d. Because of the finding that after the payment out of the fund in court of the items mentioned in Schedule D the balance of $2,804.56 should be paid to Jane C. Hitz.

LEIGH ROBINSON,
Solicitor for Complainant & Exceptant.

152 *Bond on Appeal for Costs.*

Filed Oct. 30, 1885.

In the Supreme Court of the District of Columbia, the — Day of ——, 18—.

BENJAMIN U. KEYSER, Receiver, &c., *vs.* JANE C. HITZ, JOHN HITZ, WILLIAM P. JENKS, ET AL. }

Know all men by these presents that we, Jane C. Hitz and Elias E. White, are bound unto the above-named William P. Jenks in the sum of one thousand dollars ($1,000), to be paid to the said William P. Jenks, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 29th day of October, 1885.

Whereas the above-named Jane C. Hitz has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia of July 13, 1885:

Now, therefore, the condition of this obligations is that if the above-named Jane C. Hitz shall prosecute her said appeal to effect and answer all costs if she shall fail to make good her plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JANE C. HITZ. [SEAL.]
ELIAS E. WHITE. [SEAL.]

Sealed and delivered in presence of—

——— ———.

Approved this 30th day of October, 1885.

CHARLES P. JAMES, *J.*

153 *Order for Filing Mandates and Execution for Costs.*

Filed Feb. 11th, 1889.

In the Supreme Court of the District of Columbia, the 11th Day of February, 1889. In General Term.

BENJAMIN U. KEYSER vs. JOHN C. HITZ ET AL. } # 6583, Equity Docket 19.

Order for execution of costs.

Mr. Mussey, solicitor for the defendants, having presented herein the mandates of the Supreme Court of the United States in cases Nos. 28 and No. 468, October term, 1887, of said Supreme Court, affirming the decrees herein, with costs,

It is ordered—

That said mandates be filed, and that the defendants have execution as at law for their costs, to be taxed by the clerk.

By the court:

E. F. BINGHAM,
Chief Justice.

154 *Stipulation.*

Filed Mar. 16, 1900.

In the Supreme Court of the District of Columbia.

JANE C. HITZ, Complainant, vs. JOHN STORY JENKS ET AL., Defendants. } In Equity. No. 12800.

It is hereby stipulated and agreed by and between counsel for the respective parties hereto that the foregoing and attached copies of

original papers on file in the clerk's office of this court in the case of B. U. Keyser, receiver, *vs.* Hitz *et al.*, being equity cause No. 6583, may be taken and considered as a part of the record on appeal in the above-entitled cause.

A. S. WORTHINGTON,
J. S. FLANNERY,
Counsel for Complainants.
DAVIDGE & DAVIDGE,
Counsel for Defendants.

155 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 154, inclusive, contain true and correct copies of originals in cause No. 6583, equity, wherein B. U. Keyser, receiver, is complainant and John Hitz *et al.* are defendants, as the same remain upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 16th day of March, A. D. 1900.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 960. Jane C. Hitz, appellant, *vs.* John Story Jenks *et al.* Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Mar. 17, 1900. Robert Willett, clerk.

THURSDAY, *May 3d, A. D.* 1900.

JANE C. HITZ, Appellant,
vs.
JOHN STORY JENKS, WILLIAM HENRY JENKS, RACHEL Jenks Randolph, Sarah L. Crane, and Richard W. Tyler. } No. 960.

The argument in the above-entitled cause was commenced by Mr. J. S. Flannery, attorney for the appellant, and was continued by Mr. W. D. Davidge attorney for the appellees.

FRIDAY, *May 4th, A. D.* 1900.

JANE C. HITZ, Appellant,
vs.
JOHN STORY JENKS, WILLIAM HENRY JENKS, RACHEL Jenks Randolph, Sarah L. Crane, and Richard W. Tyler. } No. 960.

The argument in the above-entitled cause was continued by Mr. W. D. Davidge, attorney for the appellees and was concluded by Mr. A. S. Worthington, attorney for the appellant.

JANE C. HITZ, Appellant,
vs.
JOHN STORY JENKS, WILLIAM HENRY JENKS, RACHEL Jenks Randolph, Sarah L. Crane, and Richard W. Tyler. } No. 960.

Opinion.

(Mr. Justice MORRIS delivered the opinion of the court.)

This is a proceeding in equity instituted in the supreme court of the District of Columbia to vacate a sale of certain real estate in this city made under a deed of trust. The proceeding resulted in a decree dismissing the bill of complaint; and from that decree the complainant has appealed.

The real estate involved in the suit is situated on the northeast corner of Ninth and G streets northwest, has a frontage of eighty feet on Ninth street and of one hundred feet on G street, and comprised about 8,200 square feet of ground, improved by a number of small brick buildings two stories in height and used for business purposes. This property, together with several other parcels of land, the appellant Jane C. Hitz, the complainant in the court below, had inherited from her father in the year 1864. At the time at which this inheritance came to her, she was the wife of John Hitz, to whom she had been married in 1856, and to whom she had borne several children. He had thereby become entitled to an inchoate tenancy by the curtesy in her estate, which remained unaffected by the married woman's act of 1869.

In 1872, John Hitz, Charles E. Prentiss, and others organized an

institution in this city which they designated as the "German-American savings bank." About five years afterwards, in 1877, they converted the institution into a national bank under the national banking law of the United States by the name of the "German-American national bank," of which John Hitz became president, and Charles E. Prentiss was made cashier. The assets of the savings bank seem to have been transferred to the national bank—among them two promissory notes dated January 5, 1876, each for the sum of $10,000, executed by one William R. Chipley to the order of one E. P. Halstead, and by the latter indorsed to the savings bank. These notes were secured, or purported to be secured, by a deed of trust of the property involved in this suit executed by John Hitz and the present appellant Jane C. Hitz, under date of January 26, 1876, to R. B. Donaldson and Charles E. Prentiss, as trustees.

In June, 1877, the German-American national bank having become financially embarrassed, John Hitz, its president, applied to William P. Jenks, of Philadelphia, through an agent in Washington, who was the appellee Richard W. Tyler, for a loan of $20,000. The loan was made upon the understanding that it should be secured by a first mortgage on the property in controversy. Accordingly, the deed of trust to Donaldson and Prentiss was released on June 16, 1877; and on the same day, by a deed purporting to be executed by Jane C. Hitz and John Hitz, her husband, the property was conveyed in fee-simple absolute to Sarah E. Crane, who was the sister of Charles E. Prentiss, for the nominal consideration of $40,000, but in reality without other consideration than to put the title in her for the purpose of executing the notes to Jenks and giving the deed of trust upon the property required for the security of such notes. Two days afterwards, on June 18, 1877, Sarah L. Crane executed her promissory note to Jenks for the sum of $20,000, and secured it by a deed of trust of even date of the property in controversy to the appellee Richard W. Tyler, as trustee. The note was drawn to the order of John Hitz, was made payable in three years from date, with interest at the rate of eight per centum per annum until paid and payable quarterly, and was indorsed by John Hitz to William P. Jenks. The deed of trust was in the usual form of such instruments in this District. Besides securing the loan, it provided for the payment of insurance, taxes and assessments; and, upon any default in the payment of the note, or of any instalment of interest due thereon, or of any sum paid by the holder of the notes for insurance, taxes, or assessments, for a sale of the property at public auction by the trustee upon such terms and at such time and place as to him should seem most for the interest of all the parties concerned, after due notice thereof by advertisement in the newspapers.

It would seem that John Hitz remained in possession of the property, and that the interest on the note given to Jenks was duly paid for some time. But on October 30, 1878, the German-American national bank failed, and Benjamin U. Keyser was by the Comptroller of the Currency appointed receiver of it under the national

banking act. Soon afterwards, on November 11, 1878, Keyser procured from Sarah L. Crane a conveyance of the equitable estate which remained in her after the deed of trust to Tyler to secure Jenks; and about January 1, 1879, he obtained possession of the property from John Hitz, and proceeded thereafter to collect the rents in his capacity as receiver of the bank appointed by the Comptroller of the Currency. It appears also that default had then been made both in the payment of taxes and in the payment of the interest due to Jenks, and that Tyler, the trustee in the deed of trust, had advertised that for such default he would expose the property for sale under the deed on January 20, 1879.

On January 10, 1879, litigation began. Keyser on that day, as receiver, filed a bill in equity in the supreme court of the District of Columbia, in equity cause No. 6583 on the docket of that court, against John Hitz, Jane C. Hitz, Sarah L. Crane, William P. Jenks, Richard W. Tyler, E. P. Halstead, R. B. Donaldson, Charles E. Prentiss, and William R. Chipley, in which he charged that the Chipley notes were unpaid; that they were assets of the bank in his hands; that the deed of release from Donaldson and Prentiss to Mrs. Jane C. Hitz of June 16, 1877, the deed of the same day from Jane C. Hitz and John Hitz, her husband to Sarah L. Crane, and the deed of June 18, 1877, from Sarah L. Crane to Richard W. Tyler, as trustee, to secure Jenks, were all in fraud of the rights of the bank, and should on that ground be vacated, and that Tyler as trustee under the deed to him had advertised the property for sale: and the prayer of the bill was for an injunction against the proposed sale, that the deeds charged to be fraudulent as to the bank should as to it be vacated, and that the deed of trust to Donaldson and Prentiss, trustees, of January 26, 1876, securing the Chipley notes, should be reinstated, and be decreed to have priority over that from Crane to Tyler to secure the indebtedness to Jenks, and for general relief. Upon this bill a preliminary restraining order was issued, and this order was subsequently continued "until the final hearing."

The several defendants named filed answers to the bill of complaint. The defense of Jenks and Tyler was that the former was a *bona fide* purchaser for value and without notice or suspicion of any of the equities set up in the bill, and that he had advanced his money to the bank in good faith for the express purpose of taking up the Chipley notes, discharging their lien on the property, and securing the first lien for himself as security for his loan. Sarah L. Crane filed a cross-bill to vacate the conveyance of the equitable title procured from her by Keyser. And Mrs. Jane C. Hitz filed a cross-bill, in which she charged that she had been induced by fraud to execute the deed of conveyance of June 16, 1877, to Sarah L. Crane; and she prayed for the cancellation of that deed and of the subsequent deed of trust from Sarah L. Crane to Tyler, and for an accounting of the rents and profits. In an amended cross-bill subsequently filed she added a further charge of fraudulent alteration of the deed from her to Sarah L. Crane by the addition, after her execution of it, of the name of her husband John Hitz as that of a party grantor.

Answers were duly filed to these several cross-bills; and after the completion of the pleadings and the taking of a large amount of testimony in respect of the issues thereby raised, the cause came on for final hearing at the special term of the supreme court of the District. A decree was then rendered, on November 13, 1881, in which it was adjudged,—1st. That the Chipley notes had been paid, and the deed of trust given to Donaldson and Prentiss as trustees to secure them had been properly released; 2d. That the deed of June 16, 1877, from Jane C. Hitz and John Hitz, her husband, to Sarah L. Crane, was null and void as to Jane C. Hitz and to her interests in the premises; 3d. That the deed of trust of June 18, 1877, from Sarah L. Crane to Richard W. Tyler, trustee, to secure Jenks was null and void as to Jane C. Hitz and her interest in the property, but valid as to any interest that John Hitz might have therein by reason of his marital relations with Jane C. Hitz; and that the injunction previously granted in the cause should be dissolved in so far as it affected such interest of John Hitz; 4th. That the deed of conveyance from Sarah L. Crane to Benjamin U. Keyser, receiver of the bank, was null and void; 5th. That Keyser should account for the rents collected by him, and that he should immediately turn over the property to Richard W. Tyler, who was appointed receiver to take possession of the property, manage it, collect the rents, and pay the taxes, insurance, and other expenses until the further order of the court.

From this decree of the special term the complainant Keyser, Jane C. Hitz, and William P. Jenks appealed to the general term of the court.

The special term subsequently, on December 15, 1881, modified the decree so far as it referred to the displacement of Keyser and the appointment of Tyler as receiver, and provided for the appointment of Keyser as receiver pending the appeal to the general term. Tyler seems not to have entered upon the receivership or into the possession of the property at this time. Keyser remained continuously in possession, first as receiver appointed by the comptroller and after the decree as receiver appointed by the court; and he so remained until the decision of the cause by the general term.

On December 11, 1883, the general term rendered a decree in the cause, reversing that of the special term, and holding that the complainant was not entitled to any relief; that there was no equity shown in the cause to prevent or delay the execution and enforcement of the deed of trust of June 18, 1877, from Sarah L. Crane to Richard W. Tyler; that the deed of June 16, 1877, from Jane C. Hitz and John Hitz, her husband, to Sarah L. Crane was a valid conveyance not only of the interest of John Hitz, the husband, but also of the estate of Jane C. Hitz in the premises; and that the deed of conveyance of November 11, 1878, from Sarah L. Crane to Benjamin U. Keyser was null and void. It was specifically decreed:

1st. That the preliminary injunction granted by the special term on February 21, 1879, against the proposed sale by Tyler as trustee should be dissolved; and that the decree of the special term, so far

as it held that the deed from Jane C. Hitz and John Hitz to Sarah L. Crane did not convey the estate of Jane C. Hitz, and so far as it retained the injunction against the sale of that estate, should be reversed.

2d. That the deed from Sarah L. Crane to Benjamin U. Keyser and her guaranty of the Chipley notes were null and void.

3d. That Keyser should account for the rents and profits received by him both before and after the decree of the special term; and that the cause should be retained to enable William P. Jenks, who claimed those rents as part of his security, Jane C. Hitz, who claimed them as her separate property, and the complainant Keyser, who claimed them as the holder of judgments against John Hitz, to litigate their respective claims thereto.

4th. That the appointment of Keyser as receiver of the court should be revoked, and that Tyler should be appointed receiver to manage the property, collect the rents, and pay the proper charges thereon, until a sale should be had under the deed of trust.

5th. That Jane C. Hitz should pay the costs incurred under her amended cross-bill, so far as the rents collected by Keyser, without prejudice to the security of Jenks, were insufficient for that purpose, and that the complainant Keyser should pay all the other costs.

6th. That the decree of the special term, so far as it was inconsistent with this decree, should be reversed.

7th. That this decree was "without prejudice to the right of any party entitled to the reversion of the said real estate and premises, or any interest in such reversion, to redeem or to make claim, as such party may be advised, to any balance or portion thereof which, upon a sale under the said deed of trust and the satisfaction of the debt secured thereby, with interest and costs, and of the expenses of sale, may remain in the hands of the trustee."

8th. That, except so far as the cause was retained as specified, all the bills, original, amended and supplemental, of the complainant, and the cross-bill and amended bills of Jane C. Hitz, should be dismissed.

From this decree an appeal was taken by Jane C. Hitz to the Supreme Court of the United States, and was allowed; and the appeal was entered in the decree itself. Subsequently, on December 31, 1883, a supersedeas bond to accompany the appeal was filed on behalf of Jane C. Hitz. The other parties seem to have acquiesced in the decree.

Some time in January of 1884, Keyser, in pursuance of the decree of the general term, surrendered the possession of the property to Tyler, as receiver appointed by the court in his place. On March 3, 1884, acting as trustee under the deed of trust to him, Tyler advertised the property for sale; and on March 26, 1884, he sold it to one Seth Caldwell, who was acting in the interest of Jenks, for the sum of $29,200. On the next day Tyler executed a deed of conveyance to Caldwell; and on April 9, 1884, Caldwell conveyed to Jenks. The proceeds of sale seem to have been insufficient to pay the indebtedness due to Jenks, there being a deficiency of upwards of $4,000.

The purpose of the present suit is to vacate this sale, andto allow Jane C. Hitz to redeem the property after a proper accounting.

As has been stated, by the decree of December 11, 1883, the court in general term had retained the cause for the purpose of an accounting by Keyser for the rents and profits collected, or which should have been collected, by him; and, the parties, as it seems, having rested in the meantime, on November 13, 1884, in pursuance of the motion of Jane C. Hitz, by her solicitor, the general term referred the cause to the auditor of the court to state Keyser's account, and to report upon the proper distribution of the fund in his hands. In pursuance of this order of reference, the auditor, on March 31, 1885, reported that, prior to December 15, 1881, when he was acting as receiver only under the appointment of the Comptroller of the Currency, Keyser had collected and distributed among the creditors of the bank the sum of $6,175.95; and that subsequently to that date, when he acted as receiver under appointment by the court, he had collected and deposited in the registry of the court, after deducting his commissions and expenses, the sum of $3,963.08, being the net proceeds of his collections down to and including part of January, 1884, at which time he surrendered the receivership to Tyler. The whole amount collected by him and paid over to the creditors of the bank or into the registry of the court was $10,139.03.

This whole fund was claimed by Keyser as an asset of the bank, by Mrs. Jane C. Hitz as her own separate property, and by William P. Jenks as properly applicable, in aid of his security, to the payment of all the taxes and assessments due and in arrears on the property. The auditor made no attempt to disturb the application made by Keyser of the fund collected by him before December 15, 1881, and distributed by him among the creditors of the bank; but, as to the fund collected subsequently to that date, he held that, so much thereof as should be required for the purpose should be applied to the payment of the taxes that had accrued during that period, being the sum of $1,058.89; and that the remainder, after the payment of some costs, being the sum of $2,804.56, should be paid to Mrs. Hitz.

This report of the auditor was rendered to the general term. That court modified the auditor's ruling to some extent, disallowed the claim of Mrs. Hitz, and decreed that the money in the registry of the court, less the costs, should be paid to Tyler as receiver to be applied by him in the satisfaction of taxes and assessments that had accrued prior to January 1, 1884. In all other respects the auditor's report was affirmed. This was on July 13, 1885.

From this decree also Mrs. Jane C. Hitz appealed to the Supreme Court of the United States, but gave no supersedeas bond, but only a bond for costs.

In the decree of the general term of July 13, 1885, was contained a further order of reference to the auditor to state the account of Tyler as receiver. On August 4, 1885, the auditor filed his report under this order. He found the receiver's receipts to have amounted to $4,573.41; his disbursements, commissions and costs to have been $4,193.37; and the balance in his hands $380.04, of which he said: "The balance remaining in the hands of the receiver I have treated

as payable to W. P. Jenks upon account of the deficiency in the payment of his indebtedness by the sale under the deed of trust."

It is claimed in this suit on behalf of Mrs. Hitz that no notice of his proceedings was ever given by the auditor to her or her counsel. It is understood that the balance of $380.04 mentioned was paid by the receiver to Jenks; but this report of the auditor seems never to have been formally acted upon by the court. It is claimed, however, on behalf of the appellees in the present proceeding, to have been confirmed by operation of the rules of the court, which provided that, if no exceptions were taken to an auditor's report within one month from the date of its being filed, the report should stand confirmed.

Mrs. Hitz had taken two appeals to the Supreme Court of the United States, one from the decree of December 11, 1883, which adjudicated the principal rights of the parties, and the other from the decree of July 13, 1885, which distributed the fund received by Keyser. Both appeals were heard together by the Supreme Court; and on November 14, 1887, that court finally affirmed both decrees (123 U. S. 297). The mandate, however, was not filed in the supreme court of the District until February 11, 1889. Reference then was had by the latter court to settle the matter of costs which had been left open; and the special auditor's report on that subject was confirmed by the court of December 1, 1890. This terminated the original litigation begun on January 10, 1879, nearly twelve years before.

The present proceeding was instituted by Mrs. Jane C. Hitz, one of the principal parties to the original proceedings, by the filing of a bill in equity in the supreme court of the District of Columbia on November 6, 1890. Jenks had died in the meantime, in October, 1886; and his title and estate in the premises had devolved under his will on his children, the appellees John Story Jenks, William Henry Jenks, and Rachel Jenks Randolph. These, with Sarah L. Crane and Richard W. Tyler, both of whom were also parties to the former litigation, were made defendants to the bill of complaint, the purpose and prayer of which were that the sale made by Tyler as trustee on March 26, 1884, should be vacated, that the complainant should be allowed to redeem the property, and that there should be an accounting for the rents and profits. The specific grounds stated in the bill, on which the sale was attacked, were eight in number, as follows:—

1st. That, at the time of sale the property was in the possession of Tyler as receiver appointed by the court to hold and manage it.

2d. Because an appeal had been taken and a supersedeas bond given:

3d. Because, without reference to the supersedeas, the trustee could not properly sell the property while the appeal was pending and the rights of the parties were in process of determination in the courts:

4th. Because the terms of sale were unreasonable:

5th. Because there were no bids and bidders were discouraged:

6th. Because the pending appeal to the Supreme Court of the United States was a cloud on the title:

7th. Because it was the understanding at the sale that it was made only to transfer title:

8th. Because the price for which the property was sole was grossly inadequate.

The bill also repeats much of the old litigation and apparently seeks to revive it.

After answers filed denying under oath all the equities of the bill, and replications filed, voluminous testimony was taken, part of which relates to the manner in which the sale was conducted and the question of the adequacy of price, and the remainder consisted mainly of the record of the preceding litigation, or of such portions of it as were deemed pertinent.

On November 28, 1899, upon hearing, the court below dismissed the bill, with costs: and from the decree of dismissal the complainant has appealed.

1. The first and principal contention on behalf of the appellant is that the sale complained of was absolutely void, because at the time of the sale the property was in the possession of the court through its receiver.

The verbal criticism is probably unimportant, that a sale cannot properly be characterized as absolutely void, which has been made by the person authorized to make it in full accordance with the power conferred on him, when the ground of invalidity is some extraneous matter to be shown by evidence; and such would be the pendency of an injunction against the sale or the possession of the property by the receiver of a court. A sale may be voidable in such a case; but it would scarcely be correct to regard it as absolutely void. We do not understand, however, that the distinction is of any importance in the determination of the question before us. For the sale may be vacated, whether it is void or only voidable.

In this connection, also, it may be stated, that the suggestion, that the appeal taken to the Supreme Court of the United States from the decree of December 11, 1883, together with the supersedeas bond accompanying it, operated to prevent the receiver Keyser from delivering the possession of the property to the receiver Tyler appointed in his place, requires no serious consideration from us; for it is no more than a suggestion, and is not seriously insisted on in argument. It cannot well be maintained as a legal proposition. A change of receivers is a very different thing from the discharge of the receivership. To some extent the latter may be suspended by appeal and supersedeas; but it cannot be that the court, in consequence of appeal and supersedeas, is deprived of the power of changing its own officer and of conserving the fund by the means which it deems best for the purpose. It is well-settled law that the court which appoints a receiver and causes a fund to accumulate in his hands, may continue to make all proper orders for the conservation of the fund, notwithstanding the appeal. (Goddard *vs.* Ordway, 94 U. S. 672). If at the time of the decree Keyser had died, or resigned, or declined further to discharge the duties of the receiver-

ship, beyond question it would have been competent for the court, notwithstanding the appeal, to appoint another person in his place; and it is not apparent why a similar substitution could not be made for any good cause in the discretion of the court. But, as we have intimated, this change of receivers is not important in the determination of the substantial question in the case. This question is, whether, while the property in controversy was in the possession of the receiver, Tyler, it was competent for Tyler, as trustee, to sell it under the deed of trust.

Various cases are cited to show that a sale of property by another person, while that property is in the possession of a court by its receiver, is invalid. Wiswall *vs.* Sampson, 14 How. 52; Peale *vs.* Phillips, 14 How. 367; Goddard *vs.* Ordway, 94 U. S. 672; Heidritter *vs.* Elizabeth Oil Cloth Company, 112 U. S. 294; McLaughlin *vs.* Janney, 6 Grattan (Va.) 609; Day *vs.* Postal Telegraph Company, 66 Md. 354. The doctrine of these cases, if it ever was controverted, is, of course, no longer open to question. But we are unable to see that it is applicable to the case before us, where the receiver was in fact authorized to sell the property, as trustee. In all the cases cited, and in all other cases where the doctrine has been applied, the sale made or action taken, which was held to be illegal and invalid, was had or taken in derogation of the right of possession vested in the receiver and of the authority of the court which appointed him, and tended to impede the control and thwart the disposition of the property by the court. But no such condition arose in this case. The court had intervened in the first instance to prevent a sale until the rights of the parties could be adjudicated, and it appointed a receiver to preserve the property intact and to collect the rents and profits. It finally found that there was no good ground of equity for further interference with the enforcement of the deed of trust, and accordingly dissolved its injunction, and permitted the trustee to proceed with the execution of the deed, retaining its receiver only until such time as the trustee was prepared to sell. The duration of the receivership was expressly limited to continue only until a sale should be had under the deed of trust. It did not authorize a sale by the trustee in express terms; for no such authority was necessary, since the authority under the deed of trust was ample: but it removed the obstacle which it had itself interposed to the exercise of the power of the trustee, and by the removal of that obstacle virtually authorized the sale. The sale, therefore, was not in derogation of the authority of the court, but in precise accordance with it; and it is very plain that it was contemplated in the decree of the court that it would speedily take place.

In fact, the continuance of the receiver in his position was in aid of the contemplated sale and in subordination to it. It is well-settled law, that deeds of trust of the nature of that here involved, and which are the usual forms of mortgage with us, do not of themselves create a lien upon the rents and profits antecedent to a sale under their provisions, and that the mortgagees have no right whatever to such rents and profits. But it is also well-settled

law, that when a mortgagee has sought to enforce his security, and is prevented from so doing by the intervention of the court, an equitable lien upon such intervening rents and profits is created in his favor, if he finally prevails in the suit, and the proceeds of sale are insufficient to satisfy the amount of the indebtedness due to him. He himself is entitled to have such a receiver, not to defeat his sale, but in aid of it and in subordination to it. And such undoubtedly was the purpose of the appointment of Tyler as receiver in this case. It was developed in the sequel that there was a deficiency of assets from the proceeds of sale, and it was decreed that Tyler's collections made by him as receiver should be applied to the satisfaction of that deficiency. It is very clear to us that a sale is neither void nor voidable by reason of the limited possession of a receiver to collect the rents and profits, when the continuance of such possession is expressly made to depend upon the occurrence of such sale.

The case of Goddard *vs.* Ordway, 94 U. S. 693, which is principally relied on by the appellant in this connection, presented a very different condition. There, after appeal taken and supersedeas bond given, it was sought in the court below to discharge the receiver and to require him to turn over to the successful party in that court the money previously collected by him as such receiver. This was in the nature of execution of the decree, and this the Supreme Court held should not be done. But that plainly was a very different case from the present. It was not pretended in that case that the receiver should still go on collecting, as though, in consequence of the appeal and supersedeas, the decree had not terminated the further exercise of his functions. There is a very great difference between the conservation of a fund already collected in order to await a final decision on appeal, and the continuance of further collections which might have been made, if the decree had been different.

We are of opinion, therefore, that the contention of the appellant in this regard is not well founded in law, and is not supported by any adjudicated case.

2. The appellant's second proposition is, that the decree or order of the special term of the supreme court of the District, enjoining Tyler as trustee from selling the property, was in force at the time the sale was made, and that this fact of itself invalidated the sale.

This proposition is based upon the theory that the general term of the supreme court of the District of Columbia was an intermediate appellate tribunal between the special term of that court and the Supreme Court of the United States, and that the superseding of the judgment or decree of an intermediate appellate tribunal by an appeal to a higher tribunal leaves the original judgment or decree in force until the final determination of the last appeal. But this theory, as applicable to the present case, is untenable. The foundation for it is wanting, since in the case of Metropolitan Railroad Co. *vs.* Moore, 121 U. S. 558, it was distinctly decided by the Supreme Court of the United States that the general term and the special term of the supreme court of the District were one and the same

court, and that an "appeal from the special to the general term was not an appeal from one court to another, but simply a step in the progress of the cause during its pendency in the same court." Whatever, therefore, might be the law, when an intermediate appellate tribunal has reversed the decree of a lower court and its own mandate is stayed by an appeal, with supersedeas, to a higher appellate tribunal, certainly a decree of the supreme court of the District of Columbia in special term could not have been revived as against a decree of that same court in general term reversing it by the mere process of appeal, with supersedeas, to the Supreme Court of the United States. As well might it be argued that an injunction *pendente lite* dissolved by the decree at final hearing could be revived by appeal from that decree, which, although it seems to be the practice in some of our States, was not the practice of the English chancery, has never been the practice in this District, and has never been admitted into the Federal jurisprudence (Slaughter-house Cases, 10 Wall. 273; Hovey *vs.* McDonald, 109 U. S. 150; Leonard *vs.* Ozark Land Company, 115 U. S. 465; Knox Co. *vs.* Harshman, 132 U. S. 14).

The decree of the supreme court of the District of Columbia in general term was the final decision of that court in the case, and it took the place of all preceding orders and decrees of that court. Upon its rendition, the decree of the special term passed out of the case; and it could not be revived by any action of the parties.

There seems to have been some question whether there was any valid supersedeas upon the appeal of Mrs. Hitz to the Supreme Court of the United States; but that question has not been raised before us, and the appeal and supersedeas have been treated as valid for all the purposes for which they could legitimately have had effect. But it is very clear to us that, under the law, they could have no further force than to stay execution of the decree in so far as the decree required execution in order to be practically effective. But, as was said by the Supreme Court of the United States, in the case of Hovey *vs.* McDonald, *supra*, "a decree itself, without further proceedings, may have an intrinsic effect which can only be suspended by an affirmative order, either of the court which makes the decree or of the appellate tribunal." And again in the same case it is said: "Neither a decree for an injunction nor a decree dissolving an injunction is suspended in its effect by an appeal, though all the requisites for a supersedeas are complied with." We think that this statement of the law by our court of last resort is decisive of the question here raised.

3. The appellant's third proposition is, that the sale, if not wholly void under the two previous contentions, is voidable and should be set aside for four several reasons, which are these:—1st. That the terms of sale were unreasonable; 2d. That an appeal was pending to the Supreme Court of the United States; 3d. That the sale was a sham and bidders were discouraged; 4th. That the price for which the property was sold was inadequate.

The second of these reasons, the pendency of an appeal to the Supreme Court of the United States, is but another form of the

proposition which has already been considered. It is not apparent upon what rule of equity or justice a sale, against which an injunction has been refused and which the party making it has a perfect right to make, can afterwards be set aside on the ground that an appeal has been taken. This proposition would give to an appeal all the force of the injunction which has been refused by the court. We find nothing in any of the cases cited that would justify any such proposition. The case of The Eastern Banking and Trust Co. *vs.* American Ice Co. 14 D. C. App. 304, in this court, is supposed by the appellant to give some color to the contention. But we do not so understand that case. There the controversy was over the foreclosure of a mortgage on some wharf property in the city of Washington. There had been some buildings on the property, but they had been destroyed by fire, and nothing was left for the mortgage to operate on except the ground. That ground was included in an area of land claimed by The United States in a suit in the supreme court of the District of Columbia, that of The United States *vs.* Morris and others, wherein it is to be presumed the parties to this cause were also parties, and wherein it had been decided by that court that the title was in the United States and not in any of the parties. The case was then pending in the Supreme Court of the United States on appeal; and subsequently by that court the decision was affirmed which adjudged the title to be in the United States. The case of The Eastern Trust and Banking Co. *vs.* America Ice Co., came before us while that appeal was pending. We reversed the decree of the lower court on other grounds, and remanded the cause for further proceedings, with the suggestion, inasmuch as the proceedings were wholly within the control of the court, that the sale, if sale should be decreed, should not be allowed until after the decision of the Supreme Court of the United States in the case of Morris *vs.* United States. In this latter case it had already been adjudged that the United States, and not either of the parties to the suit before us, were the owners of the property in controversy. There was, therefore, as matters then stood, no property whatever to sell; and the only hope that there would be property to sell lay in the possibility that the decision in the case of Morris *vs.* United States might be reversed. This was plainly a speculative contingency. But that is not the present case. Here there was no question as to the ownership. The validity of the deed of trust, it is true, had been contested by the present appellant, but it had been adjudged against her contention. And if there was doubt, thereafter, in regard to the respective rights of the parties, it was doubt which the appellant herself had created by her appeal. It would be a dangerous doctrine to hold that a mortgagor, by the mere institution of a suit, or by the taking of an appeal in a suit wherein he has been defeated, can render invalid a sale otherwise perfectly valid. We cannot think that such a proposition as that here advanced is sound in law.

The other grounds, on which it is sought to invalidate the sale, refer rather to matters of fact than to matters of law. The first of

them is that the terms of sale were unreasonable, in the requirement that the purchase-money should all be paid in cash. This is undoubtedly an unusual requirement so far as sales in recent times are concerned; but it is not unprecedented, and we cannot say that it is of itself unreasonable. Theoretically, all sales are presumed to be for cash; and the giving of credit is an indulgence, and not a right. The trustee had been given the power to fix the terms of sale; and while the abuse of such power will be closely watched by a court of equity and relief given against it, we cannot hold, as a rule of law, apart from the circumstances of the case, that the requirement of cash, instead of cash and credit, is unreasonable. No case is cited wherein any such rule has been held, and we do not think that any can be cited. Nor was there anything in the circumstances of the case to show that the requirement was in itself unreasonable. Reference is made to the fact that, when the trustee first advertised the property for sale, about the time of the commencement of the litigation, in 1879, his terms had been for part cash and part credit; and this seems to be relied on to some extent as showing the unreasonableness of the requirement for the later advertisement and sale in 1884. But there had been five years of harassing litigation, wholly unfounded in justice so far as the creditor Jenks was concerned, as was held by the concurrent decisions of the supreme court of the District of Columbia and the Supreme Court of the United States; and the creditor had long been deprived of his money and of all return from it. He was entitled to have it all back, and not merely a part, and to be postponed for the residue for other years to come. When one lends his money for three years, it does not mean that he will be compelled to wait for five, or seven years, for its repayment. He is entitled to have the contract performed as it has been made.

We do not mean to be understood as holding that a requirement that the whole purchase-money in such cases should be paid in cash, would be reasonable under all circumstances. Parties may have contracted with reference to a prevalent usage; or there may be circumstances which would make such a requirement harsh and oppressive. But when such a requirement is distinctly within the authority conferred on the trustee, as it is here, we think that it is incumbent on the person who would attack it, to show its unreasonableness by competent testimony. Nothing of that kind is attempted in the present case.

In the next place, it is objected that the sale was a sham and that bidders were discouraged. We find no evidence whatever in the record to sustain this charge. There are some vague statements by unnamed and unauthorized persons that the sale was intended merely "to pass title," whatever that may mean; but we find no evidence that it would indicate in the remotest degree that the sale was not conducted in good faith.

Finally, it is alleged that the price for which the property was sold was inadequate. But mere inadequacy of price, if it exists, as it has been well settled, is no reason for the vacation of a sale, unless there are some circumstances of unfairness in the conduct of the sale.

If it could be shown that the inadequacy existed, that it was occasioned by the trustee's requirement that the purchase-money should all be paid in cash, that bidders were thereby discouraged, and that these conditions were caused or contemplated by the trustee or the creditor Jenks, then undoubtedly there might be ground for the intervention of a court of equity. But we are not satisfied that the testimony has established the fact of inadequacy of price, at all events inadequacy to such an extent as that a court of equity would be justified in interfering.

On this point five witnesses were called on behalf of the appellant, who testified variously that the property at the time of the sale in 1884 was worth from about $4.50 to about $8 a square foot, or from about $38,000 to about $65,000 in all. But they were all men of very limited experience in real estate, and had no basis whatever of other sales in the neighborhood upon which to base their opinion. On the other hand, some sixteen or seventeen witnesses, including some of the most prominent and experienced real-estate agents in the city of Washington, were called on behalf of the appellees; and they all testified with one accord that the sum which the property brought at the sale, that is $29,200, which was a little upwards of $3.50 a square foot, was a full and fair price for it at the time. Some would not have given so much, and some thought that $3 a square foot was all that it was worth. And all based their opinions on other sales in the neighborhood, both on F street and on G street, at or about the same time. Some of them testified that they had gone to the sale, and had bid for the property, but that they had been unwilling to go as high as the figure for which it was sold. The preponderance of testimony is so overwhelmingly in favor of the appellees on this point that we do not deem it necessary to give it further consideration. It is very clear to us that the allegation of inadequacy of price is wholly unsustained by the testimony.

The appellant, in our opinion, has not, as complainant in the court below, proved her case; and being of that opinion, we regard it as unnecessary for us to examine the defenses of *res adjudicata* and laches set up by the appellees in defense of the suit,—the one based on the assumption that the validity of the sale in question was involved in the decree of the supreme court of the District, rendered on July 13, 1885, and in the decision of the Supreme Court of the United States affirming that decree; and the other founded on the lapse of time between the date of the sale (March 26, 1884) and the time of the institution of the present suit (November 6, 1890), a period of more than six years and seven months, during which Jenks and one or two other persons connected with the transaction had died, but during the greater part of which time, it is true, the litigation was pending.

We conclude that no error has been shown in the decree of the supreme court of the District of Columbia now appealed from, and that this decree should be affirmed, with costs.

And it is so ordered.

WEDNESDAY, *June 6th, A. D.* 1900.

JANE C. HITZ, Appellant,
vs.
JOHN STORY JENKS, WILLIAM HENRY Jenks, Rachel Jenks Randolph, Sarah L. Crane, and Richard W. Tyler. } No. 960. April Term, 1900.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said supreme court, in this cause, be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE MORRIS.

June 6, 1900.

TUESDAY, *June 12th, A. D.* 1900.

JANE C. HITZ, Appellant,
vs.
JOHN STORY JENKS, WILLIAM HENRY JENKS, RACHEL Jenks Randolph, Sarah L. Crane, and Richard W. Tyler. } No. 960.

On motion of Mr. J. S. Flannery, attorney for the appellant in the above-entitled cause, it is ordered by the court that said appellant be allowed an appeal to the Supreme Court of the United States on giving bond in the sum of five hundred dollars.

Know all men by these presents, that we, Jane C. Hitz of Washington D.C., as principal, and William H. Saunders, of Washington, D.C., as surety, are held and firmly bound unto John Story Jenks, William Henry Jenks, Rachel Jenks Randolph, Sarah L. Crane and Richard W. Tyler, in the full and just sum of five hundred dollars ($500.00) to be paid to the said John Story Jenks, William Henry Jenks, Rachel Jenks Randolph, Sarah L. Crane, and Richard W. Tyler, or their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixteenth day of June, in the year of our Lord one thousand nine hundred.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between Jane C. Hitz, and said John Story Jenks, William Henry Jenks, Rachel Jenks Randolph, Sarah L. Crane and Richard W. Tyler, a decree was rendered against the said Jane C. Hitz and the said Jane C. Hitz having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said John Story Jenks, William Henry Jenks, Rachel Jenks Randolph, Sarah L. Crane, and Richard W. Tyler

citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof,

Now, the condition of the above obligation is such, that if the said Jane C. Hitz shall prosecute said appeal to effect, and answer all costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

JANE C. HITZ. [SEAL.]
WM. H. SAUNDERS. [SEAL.]

Sealed and delivered in the presence of—
WILLIAM HITZ.

Approved by—
R. H. ALVEY,
Chief Justice.

Surety approved this 19th day of June, 1900.
DAVIDGE & DAVIDGE.

[Endorsed:] No. 960. Jane C. Hitz, appellant *vs.* John Story Jenks *et al.* Bond on appeal to Supreme Court of the U. S. Court of Appeals District of Columbia. Filed Jun- 22, 1900 Robert Willett clerk

UNITED STATES OF AMERICA, *ss:*

To John Story Jenks, William Henry Jenks, Rachel Jenks Randolph, Sarah L. Crane, and Richard W. Tyler, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Jane C. Hitz is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 22d day of June, in the year of our Lord one thousand nine hundred.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 22nd day of June, 1900.
DAVIDGE & DAVIDGE,
Sol'rs for Appellees.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun- 23 1900 Robert Willett, clerk.

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 360 inclusive, contain a full, true and correct copy of the transcript of record and proceedings of said Court of Appeals in the case of Jane C. Hitz, appellant, *vs.* John Story Jenks, William Henry Jenks, Rachel Jenks Randolph, Sarah L. Crane and Richard W. Tyler, No. 960, April term, 1900, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 25th day of June, A. D. 1900.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 17,820. District of Columbia Court of Appeals. Term No. 99. Jane C. Hitz, appellant, *vs.* John Story Jenks, William Henry Jenks, Rachel Jenks Randolph, Sarah L. Crane and Richard W. Tyler. Filed June 29, 1900.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 99.

JANE C. HITZ, APPELLANT,

vs.

JOHN STORY JENKS ET AL., APPELLEES.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a decree of the Court of Appeals of the District of Columbia affirming a decree of the supreme court of the District in a suit in equity brought to set aside a sale of valuable real estate in the city of Washington, D. C., which was made on the 26th day of March, 1884, by one Richard W. Tyler, as trustee under a certain deed of trust made by one Sarah L. Crane. The appellant, Mrs. Hitz, had been the owner of this real estate, but by means of a deed purporting to be executed by her the title had been transferred to Sarah L. Crane (135), who had executed a deed of trust to Richard W. Tyler to secure the payment of $20,000 to William P. Jenks (137).

The object of this litigation is to limit the estate of Jenks to receiving the entire principal of the debt so secured, with interest at the rate of 8 per cent. per annum, and to prevent his representatives from securing in addition the appellant's equity of redemption in property worth at least $150,000.

On October 30, 1878, the German-American National Bank in Washington failed, and Benjamin U. Keyser was appointed receiver of the bank by the Comptroller of the Currency. In January, 1879, Keyser began a suit in the supreme court of the District of Columbia against Jane C. Hitz, John Hitz, her husband; Sarah L. Crane, William P. Jenks, Richard W. Tyler, and others, by which he sought to have a prior deed of trust, which had been given by Mrs. Hitz to secure the bank, reinstated on the ground that the release of that trust and the execution of the second deed of trust to secure Jenks were fraudulent and void as against the bank. Keyser also asked that Tyler, as trustee under the deed of trust to secure Jenks, should be restrained from a threatened sale of the property (89). A restraining order was granted enjoining the sale until further order of the court (96). On the 21st of February, 1879, a preliminary injunction was granted, to continue "until the final hearing" (96, 97).

On October 21, 1879, Mrs. Hitz filed a cross-bill against Keyser and her codefendants, alleging that she had been induced to execute the deed to Crane by fraud, in ignorance of its contents, and praying for the cancellation of that deed, and also of the deed of trust from Crane to Tyler to secure Jenks, and for an accounting of the rents and profits (107). By an amended cross-bill, filed November 13, 1880, she alleged that her deed to Crane was fraudulently altered, after she had executed it, by inserting after her name the name of her husband as one of the grantors (113). The point of this contention was that at that time in the District of Columbia a deed by a married woman was void unless her husband joined with her in its execution.

The case came on for final hearing in the special term, before Mr. Justice Wylie, and on the 28th of November, 1881, a decree was entered sustaining Mrs. Hitz's claim that the deed by which her title to the property had been conveyed away was void (except as to the interest of her husband, John Hitz, which was that of a tenant by the curtesy). This decree dissolved the pending injunction only in so far as it related to the interest of John Hitz in the property. Keyser, as receiver of the bank under appointment by the Comptroller of the Currency, had been in possession of the property for several years, and the decree directed him to account to the court for the rents collected by him from the time the property came into his possession (116, 117). In view, apparently, of an appeal to the court in general term, Tyler by the decree itself was appointed receiver, to take possession of the property and collect the rents, applying the same, so far as necessary, to the payment of taxes, insurance, and other expenses until the further order of the court. From this decree Keyser, Mrs. Hitz, and Jenks severally appealed to the court in general term—Mrs. Hitz's appeal evidently raising the question whether her husband had any interest in the property as tenant by the curtesy.

On December 15, 1881, this decree was modified by an order which practically made Keyser the receiver in place of Tyler, and required him to bring the rents and profits of the property from month to month into the registry of the court (118).

The court in general term, on December 11, 1883, reversed the decree of the special term, holding that Mrs. Hitz had lost her title to the property. The present case turns very largely upon the construction and effect of this decree of the general term (120, 121, 122). Its provisions which are pertinent to the present case are as follows:

I. That the injunction granted on the 21st of February, 1879, enjoining a sale under the deed of trust to Tyler to

secure Jenks, should be dissolved, and that the decree in special term, in so far as it held that the deed which Mrs. Hitz had assailed was void as to her interest in the property, should be reversed.

II. That Keyser should account for all the rents and profits received by him, both before and after the decree in the special term, and "that the parties aforesaid claiming the said rents and profits have leave to litigate in this cause, and as they may be advised, their respective claims, and that for said purposes this cause be, and the same is hereby, retained."

III. That the order of the special term of December 15, 1881, authorizing the collection of the rents and profits by Keyser, should be revoked; and

"That Tyler be, and he is hereby, appointed receiver, with power, until a sale shall be made under the said deed of trust, to take and hold possession of said real estate and premises, and to rent and manage the same and to collect the rents and profits and apply the same to the payment of the taxes, insurance, and any proper expenses, and it shall be the duty of the said receiver, after such application, to pay from time to time the said rents and profits into court, and from time to time to make report to the court of the manner in which he has discharged his trust."

IV. That, save so far as retained, the bill and cross-bill and amendments thereto, should be dismissed.

The last paragraph of the decree is as follows:

"From this decree Jane C. Hitz, complainant in her cross-bill, and one of the defendants, prays an appeal to the Supreme Court of the United States, which appeal is allowed" (122).

Within twenty days thereafter, on the 31st of December, 1883, the appeal bond of Mrs. Hitz was approved as such and was filed in the cause (123).

Some time in January, 1884, apparently, Keyser, notwithstanding the taking of the appeal and the filing of the *supersedeas* bond, surrendered possession of the property to Tyler, and on March 3, 1884, Tyler, as trustee under the deed of trust from Crane, advertised the property for sale. On the 10th of March following the publication of this advertisement of sale his attention was called to the appeal and *supersedeas* by counsel for Mrs. Hitz (9). Notwithstanding this, Tyler sold the property on March 26, 1884, to Seth Caldwell, Jr., of Philadelphia, Pennsylvania, for the sum of $29,200. On the following day, Tyler conveyed the property to Caldwell (141), and, on the 9th of April following, the property was conveyed by Caldwell and wife to Jenks (142). It is not disputed that Caldwell acted as Jenks' agent in buying the property.

It was to set aside this sale that the present suit was instituted.

After the sale of the property, and on November 13, 1884, in order to determine the controversy over the rents and profits which had been collected by Keyser while he was in possession of the property, the cause was referred to the auditor to state the account of Keyser for rents collected or which should have been collected by him both before and after the order of December 15, 1881, and directing the auditor to report as to the proper distribution of the fund and whether or not any taxes should be paid out of it (124).

On March 31, 1885, the auditor filed his report and accompanying schedules, from which it appeared that prior to December 15, 1881, Keyser, as bank receiver, had collected and distributed among the creditors of the bank $6,175.95, and that subsequently to that date he had deposited in the registry of the court, after deducting his commissions, etc., the sum of $3,963.08 (125, 131, 133), being rents down to and including part of January, 1884.

This fund of over $10,000 was claimed by Mrs. Hitz as her own separate property, by Jenks as properly applicable

to all taxes and assessments due on the property, and by Keyser as an asset of the bank. The auditor made no attempt to dispose of the fund which had been collected by Keyser prior to the order of December 15, 1881, and distributed to the creditors of the bank, but held that the rents collected by him subsequently to that date and paid into the registry of the court should be applied to the payment of the taxes which had accrued since December 15, 1881, only, and that the balance was payable to Mrs. Hitz. On hearing the exceptions filed by all of the parties, the court in general term, July 13, 1885, denied the claim of Mrs. Hitz to any portion of the fund in the registry of the court; found that the net rents in hand would not pay the taxes due, and directed that the fund be paid over to Tyler, as "receiver herein," to be applied to the payment of the taxes and assessments (and interest thereon) accruing prior to the date when Keyser surrendered possession to Tyler as his successor in the receivership (134, 132). The cause was then "referred to the auditor to state the account of said receiver" (134). The opinion of the general term, in pursuance of which this order was entered, is reported in 4 Mackey, 179.

Tyler, as receiver, submitted to the auditor a report dated July 31, 1885, and on August 4, 1885, the report of the auditor thereon was filed (145, 146, 147). The record discloses no notice to any of the other parties in interest of the proceedings before the auditor or of the filing of his report. Such notice was required by the rules of the court (84). The report was never confirmed by the court. There was in force at the time, however, a rule of the court which provided in substance that if no exception was filed to the report of the auditor within thirty days after it was lodged in the clerk's office it should stand confirmed at the next rule day.

From the decree of the general term of July 13, 1885, Mrs. Hitz, in open court, on the same day, appealed to this court (135).

This appeal and her appeal from the decree of December 11, 1883, were heard together in this court, and on November 14, 1887, it affirmed both decrees of the general term (123 U. S., 297). The mandates of this court were filed in the supreme court of the District of Columbia on February 11, 1889 (153, 155). Thereupon, on motion of counsel for defendants, the cause was referred to a special auditor to tax the costs, and on December 1, 1890, the litigation was closed by an order of the court confirming this special auditor's report (162).

Before it was closed, on November 6, 1890, Mrs. Hitz filed her bill in the present cause asking that the sale of the property in question made by Tyler on the 26th of March, 1884, be set aside, because at the time of the sale the property was in the possession and custody of a receiver appointed by the court, and because the decree of the general term of December 11, 1883, had been superseded (11). The bill assigned other reasons for asking that the sale be set aside, but as we shall not argue any of them here, it is not necessary to encumber this brief with a reference to them or to the evidence and proceedings of the court below relating to them. Jenks having died in October, 1886 (11–15), while the original case was pending on appeal in this court, his children, who were also his devisees, were made defendants.

The cause came on for hearing before Mr. Justice Cole, and on November 28, 1899, a decree was entered dismissing the bill with costs (250). Mrs. Hitz appealed to the Court of Appeals (251). That court, on June 6, 1900, affirmed the decree (349). The opinion of the court, which was delivered by Mr. Justice Morris, is in the record (335–348). On the 12th of June, 1900, Mrs. Hitz appealed to this court from the decree of the Court of Appeals, and duly perfected her appeal (349, 350).

It will be seen from the opinion of Mr. Justice Morris that the Court of Appeals held that the sale made by Tyler under the deed of trust to secure Jenks was not void, either

because the property sold at the time of sale was in the possession of the receiver of the court or because the decree of the general term, which the Court of Appeals holds authorized the sale to be made, had been superseded. Because it held the sale was not void, the Court of Appeals deemed it unnecessary to consider two defenses which had been set up, one of these defenses being a claim that the proceedings in the original case, subsequent to the sale, relating to the distribution to be made of the rents collected from the property, first by Keyser and afterwards by Tyler, amounted to a conclusive adjudication against Mrs. Hitz of her contention that the sale was void, and the remaining defense being that she was guilty of such laches in instituting the present suit that the court would not entertain her claim for relief, however well founded it might have been if seasonably presented.

It will be seen that all the appellant asks is the privilege of redeeming her property by paying the full amount of the debt secured by the Crane deed of trust to Tyler. That is the prayer of her bill (12). The indebtedness so secured is $20,000, with interest, at the rate of eight per cent. per annum, till paid (15). The defendants have been collecting the rents of the property, and are asked only to account for the net rents as a credit on the debt. The appellant seeks to get back what, if anything, may remain of her property after the claims of her creditors shall have been satisfied to the last cent, principal and interest.

ASSIGNMENT OF ERRORS.

The court below erred:

I. In holding that the sale of the property in question made by Richard W. Tyler on the 26th day of March, 1884, was valid, notwithstanding the fact that at the time of the sale the property was in his custody as a receiver appointed

by the supreme court of the District of Columbia in general term by its decree of December 11, 1883.

II. In holding that said decree of December 11, 1883, authorized or permitted said Tyler to make said sale.

III. In holding that said sale was valid, notwithstanding the fact that said decree of December 11, 1883, which is claimed to have authorized the sale, had been superseded by the taking of an appeal to this court and the seasonable filing of a supersedeas bond.

IV. In affirming the decree of the supreme court of said District dismissing the appellant's bill and denying her the relief she claimed.

ARGUMENT.

I.

The sale in question was absolutely void, because at the time of the sale the property sold was in the possession of the supreme court of the District, through Tyler, its receiver.

This was the exact question decided in the case of Wiswall *vs.* Sampson, 14 How., 52. In that case, while real estate was held by a receiver it was sold, not as here by a person exercising no judicial authority, but by a marshal, and in pursuance of the writ of a circuit court of the United States, commanding him to execute its judgment by a sale of the property of the defendant in an action at law pending in the circuit court. The opinion of the Supreme Court contains the following passages:

"A party, therefore, holding a judgment which is a prior lien upon the property *the same as a mortgage*, if desirous of enforcing it against the estate after it has been taken into

the care and custody of the court to abide the final determination of the litigation, and pending that litigation, must first obtain leave of the court for this purpose. The court will direct a master to inquire into the circumstances whether it is an existing unsatisfied demand or as to the priority of the lien, etc., and take care that the fund be applied accordingly.

* * * * * * *

"It has been argued that a sale of the premises on execution and purchase, occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court; and that the sale therefore, in such a case, should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. *The property is a fund in court*, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And, in order to effect this, the court must administer it independently of any rights acquired by third persons, pending the litigation. Otherwise, the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless.

* * * * * * *

"As we have already said, it is sufficient, for the disposition of this case, to hold, that while the estate is in the custody of the court, *as a fund* to abide the result of a suit pending, no sale of the property can take place either on execution or otherwise, without the leave of the court for that purpose. And upon this ground, we hold that the sale by the marshal on the two judgments was illegal and void, and passed no title to the purchaser."

The same principle has been maintained by this court in many other cases. Thus, in Peale *vs.* Phipps, 14 How., 367, the court laid down the now familiar doctrine that a receiver appointed by a State court could not be sued in that

capacity in a circuit court of the United States, the court saying:

"The plaintiff in error held the assets of the bank as the agent and receiver of the court of Adams county, and subject to its order, and was not authorized to dispose of the assets, or to pay any debts due from the bank, except by the order of the court. He had given a bond for the performance of this duty, and would be liable to an action, if he paid any claim without the authority of the court from which he received his appointment, and to which he was accountable. The property, in legal contemplation, was in the custody of the court of which he was the officer, and had been placed there by the laws of Mississippi. And while it thus remained in the custody and possession of that court, awaiting its order and decision, no other court had a right to interfere with it, or to wrest it from the hands of its agent, and thereby put it out of his power to perform his duty."

In Heidritter *vs.* Elizabeth Oilcloth Company, 112 U. S., 294, Mr. Justice Matthews, delivering the unanimous opinion of this court, emphatically reaffirmed the decision in Wiswall *vs.* Sampson. In the Heidritter case property was sold under process of a State court which was in the possession of a district court of the United States when the suit in the State court was begun, but had passed out of the possession of the Federal court at the time of the sale by the State court; yet, even in that case, Mr. Justice Matthews, after quoting from the opinion in Wiswall *vs.* Sampson, that the sale involved in that case "was illegal and void," goes on to say:

"And the same conclusion must prevail here; for, although the sale under the judgments in the State court was not made until after the property had passed from the possession of the district court by delivery to the purchaser at the sale under the decree, yet the initial step on which the sheriff's sale depended—the commencement of the proceedings to enforce the mechanics' lien, asserting the jurisdiction and control of the State court over the property

sold—took place when that property was in the exclusive custody and control of the district court; and by reason of its prosecution to a sale, was an invasion of the jurisdiction of that court. No stress is laid on the fact, that notice of the proceeding, by affixing a copy of the summons upon the building, which was required by the statute, could only be made by an actual entry by the sheriff upon the property, to that extent disturbing the possession of the marshal, because the same result, in our opinion, would have followed, if no such notice had been required or given. The substantial violation of the jurisdiction of the district court consisted, in the control over the property in its possession, assumed and asserted, in commencing the proceedings to enforce against it the lien claimed by the plaintiffs in those actions, prosecuting them to judgment and consummating them by a sale. The principle applied in Wiswall *vs.* Sampson, *ubi supra*, must be regarded as firmly established in the decisions of this court. It has been often approved and confirmed. Peale *vs.* Phipps, 14 How., 367; Hagan *vs.* Lucas, 10 Pet., 400; Williams *vs.* Benedict, 8 How., 107; Pulliam *vs.* Osborne, 17 How., 471; Taylor *vs.* Carryl, 20 How., 583; Yonley *vs.* Lavender, 21 Wall., 276; People's Bank *vs.* Calhoun, 102 U. S., 256; Barton *vs.* Barbour, 104 U. S., 126; Covell *vs.* Heyman, 111 U. S., 176."

The rule laid down in the case of *Wiswall vs. Sampson*—that where property is in the possession of a receiver duly appointed by a court of chancery it is in the custody of the court, and no valid sale thereof can be made without first obtaining for that purpose the authority of the court which appointed the receiver—has been adhered to by this court from the time that decision was rendered, in December, 1852, until the present time.

See—

Barton *vs.* Barbour, 104 U. S., 126, 129.

Krippendorf *vs.* Hide, 110 U. S., 276.

In re Tyler, petitioner, 149 U. S., 164, 181.

Pittsburg, etc., Railway *vs.* Loan & Trust Co., 172 U. S., 493, 513.

In the case of Tyler, petitioner, it was held that property of the South Carolina Railway Company, which was in the possession of a receiver duly appointed by the circuit court of the United States for the district of South Carolina, was not subject to seizure and levy under a process issuing from a court of the State to enforce the collection of a tax assessed upon the property of the railroad company under the laws of the State. The court there said:

"The property in question was in the custody of the circuit court, in a cause within its jurisdiction, and protected by injunction. The power exercised was the power to protect the property in the custody of the court from invasion, and in order to sustain the receiver's application the ordinary grounds of equity interposition were not required to be set forth."

* * * * * * *

"No rule is better settled than that when a court has appointed a receiver, his possession is the possession of the court, for the benefit of the parties to the suit and all concerned, and cannot be disturbed without the leave of the court; and that if any person, without leave, intentionally interferes with such possession, he necessarily commits a contempt of court, and is liable to punishment therefor."

Citing—

Wiswall *vs.* Sampson, 14 How., 52, and a number of other cases.

* * * * * * *

"The general doctrine that property in the possession of a receiver appointed by a court is *in custodia legis*, and that unauthorized interference with such possession is punishable as a contempt, is conceded; but it is contended that this salutary rule has no application to the collection of taxes. Undoubtedly, property so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law, but this does not justify a physical invasion of such custody and a wanton disregard of the orders of the court in respect to it. The maintenance of the system of checks and

balances characteristic of republican institutions requires the co-ordinate departments of government, whether Federal or State, to refrain from any infringement of the independence of each other, and the possession of property by the judicial department cannot be arbitrarily encroached upon, save in violation of this fundamental principle.

"The levy of a tax warrant, like the levy of an ordinary *fieri facias*, sequestrates the property to answer the exigency of the writ; but property in the possession of a receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face."

In the recent case of Pittsburg, etc., Railway Co. *vs.* Loan and Trust Co., *supra*, this court was called upon to consider what constituted an invasion of the possession of a receiver, and while holding that the facts in that case did not show that the possession of the receiver had been interfered with, it adhered to the doctrine in Wiswall *vs.* Sampson, and said that if the facts of the case had disclosed an actual sale of the property while it was in the possession of receivers pending the proceedings in the foreclosure suits, the doctrine laid down in that case would apply and such sale would have been ineffectual to pass title to the purchaser.

It was there shown that while the property of the railway company was in the custody of receivers appointed by the circuit court of the United States to hold it pending the result of proceedings instituted to foreclose a mortgage upon said property, one Lynde purchased thirty-six bonds secured by a prior mortgage, and it was contended by such purchase Lynde could not acquire a lien under the mortgage

securing the bonds upon the property in the hands of the receivers. The court said:

"We have seen that when Lynde purchased the thirty-six bonds, to secure which with other bonds, the Parkhurst mortgage had been previously executed, the property described in that mortgage and here in question was in the actual custody of the circuit courts of the United States by receivers appointed in the foreclosure suits brought by Roosevelt & Fosdick. The contention of the plaintiff in error is that the property was a fund in those courts to abide the event of the litigation in them, and that, pending the proceedings in those courts and the actual possession of the property, it was impossible that Lynde, by purchasing the thirty-six bonds, could have acquired any lien thereon which the law would recognize and enforce."

"The principal authority cited in support of this contention is Wiswall *vs.* Sampson, 14 Howard, 52–68, in which it was held that while real estate is, 'in the custody of the court as a fund to abide the result of a suit pending, no sale of the property can take place, either on execution or otherwise, without the leave of the court for that purpose.'"

"If the rule were otherwise," the court said, "the whole fund might pass from its hands before final decree and the litigation become fruitless. We do not perceive that the principle announced in Wiswall *vs.* Sampson controls the determination of the present case. *If there had been any attempt by suit to enforce the lien given by the Parkhurst mortgage by an actual sale of the property in question pending the proceedings in the foreclosure suits, it may be that the principle announced in that case could have been invoked, and the sale would have been ineffectual to pass title to the purchaser.* But nothing was done by Lynde, after the institution of the foreclosure suits and pending proceedings therein, which was inconsistent with or tended to defeat the object of those suits. He only purchased the bonds in question, and such purchase was not hostile to the possession by the circuit courts in the foreclosure suits of the property mortgaged to secure them, simply because by such purchase he succeeded to an interest in the Parkhurst mortgage. The foreclosure suits proceeded to a final decree without any attempt to interfere with the custody and control of the property for the purposes avowed in those suits."

The Federal courts of the United States, as well as the State courts, have regarded as settled law and unquestioned authority the doctrine laid down in Wiswall *vs.* Sampson.

In Virginia, etc., Iron Co. *vs.* Bristol Land Co., 88 Federal Reporter, 134, the circuit court for the western district of Virginia reviewed the decisions of this court, and held that where land of the defendant company was in the custody of a receiver duly appointed to wind up its affairs, a sale of such lands for taxes is void and the purchaser at such sale acquires no title thereunder. The court in its opinion said:

"The chief defense relied on by the defendants in their answers is that Smith, the treasurer of the city of Bristol, having under the provisions of the Virginia tax law, sold the lots in question to the auditor of public accounts of the State of Virginia for the benefit of the Commonwealth and the city of Bristol, that that was a valid sale, and that the other defendants, in pursuance of the provisions of another section of the tax law touching delinquent lands, are simply endeavoring to acquire the title which vested in the auditor for the benefit of the Commonwealth and city of Bristol. If the treasurer, Smith, had no right to invade the jurisdiction of this court, and take control of and dispose of property in the hands of its receiver; if in doing this he was in contempt of this court,—then the court is at a loss to see on what principle he could make a valid sale of this property to the auditor for the benefit of the Commonwealth and the city of Bristol, any more than he could make a valid sale to a private person.

"His authority as a tax-collector to dispose of these lands as delinquent for the non-payment of taxes ceased when the proceedings were instituted for the sequestration of all the property of the Bristol Land Company. *After that no person or officer, whether State or Federal, not even the receiver himself, could sell any of the property except by an order of the court. A sale made in any other way or by any other person is null and void.*"

41 S.W. 699 (Tex. Civ. App.)

In the case of Scott *vs.* Crawford (decided in June, 1891), which was an action by Crawford and others against the

Clark-Plumb Company, a Texas corporation, in which Scott had intervened and asked the court to deliver to him certain lands which he had purchased at a sale by the trustee under a power given in a deed of trust made to secure the payment of certain promissory notes, the court of civil appeals of Texas held that the sale made by such trustee while the property was in the possession of a receiver regularly appointed by the district court of the United States was absolutely void. The court in its opinion follows the decision of this court in Wiswall *vs.* Sampson and says:

"We are inclined to think that the sale made by the trustee while the lands were in the possession of a receiver is void and cannot be sustained (Ellis *vs.* Water Co., 86 Tex., 109; 23 S. W., 862; Wiswall *vs.* Sampson, 14 How., 52). It is true, that in this case the sale had been made under an execution issued by another court than the one in which the receivership was pending and not under and by virtue of a deed of trust and power of sale as in this instance; but the writer at least can see no good reason why the rule should not apply with equal, if not greater force, in the latter case. In Wiswall *vs.* Sampson, *supra*, the Supreme Court of the United States say: 'The settled rule also appears to be that where the subject-matter of the suit in equity is real estate which is taken into the possession of the court pending the litigation by the appointment of a receiver or by sequestration, the title is bound from the filing of the bill; and any purchaser *pendente lite*, even if for a valuable consideration, comes in at his peril.' Again the court says: 'As we have already said, it is safe for the disposition of this case to hold that while the estate is in the custody of the court as a fund to abide the result of a suit pending, no sale of the property can take place either on execution or otherwise without leave of the court for that purpose, and upon this ground we hold that the sale by the marshal on the two judgments was illegal and void and passed no title to the purchaser.' If this invalidity results from the 'title being bound' when the land is placed in the possession of a receiver, as is declared by this decision, then no sale of any character, whether *under deed of trust*, power of attorney, process of court or otherwise, can affect the title in the hands

of the receiver if made without consent of the court having custody thereof."

Other cases affirming the doctrine of Wiswall *vs.* Sampson are:

Walling *vs.* Miller, 108 N. Y., 172, 177.
Russell *vs.* Railway Co., 68 Tex., 652.
Gay *vs.* Brierfield, 94 Ala., 310.
Dugger *vs.* Collins, 69 Ala., 330.

The court of appeals of Virginia, in a suit which went to that court from the circuit court of the United States for the county of Alexandria, in the District of Columbia, after that county was retroceded to Virginia, held that commissioners to sell (trustees), appointed to execute a decree of the lower court, proceeding to sell under such decree, after an appeal taken and supersedeas bond given, were guilty of a contempt of the appellate court, and their acts were *null* and *void as to the rights of the parties to the appeal.*

McLaughlin *vs.* Janney, 6 Grattan (Va.), 609.

No stronger statement of the doctrine here relied upon is to be found anywhere than in the case of Day *vs.* Postal Telegraph Company, 66 Md., 354, 367, 368, in which case Mr. Chief Justice Alvey, delivering the opinion of the court, said:

"But whatever may have been the purposes and designs of the parties professing to represent these companies in the transactions between them, it is very clear, upon most unquestionable authority, that after the affairs of the New York company had been placed in the hands of receivers by the supreme court of New York, which was on the 3d of May, 1885, and so likewise after receivers had been appointed by the court in this State, nothing could be done whereby the *status* of the affairs of that company could be effectually changed, or its rights in any way lessened or prejudiced, without the sanction of the court having jurisdiction of the subject-matter. Any person relying upon

such transaction for his protection, must show that what was done was done with the sanction of the court. The receiver is but the officer or agent of the court from which he derives his appointment, and his possession is exclusively the possession of the court; the property being regarded as in the custody of the law, *in gremio legis*, for the benefit of whoever may be ultimately determined to be entitled to its possession (High on Rec., secs. 134, 139). And this strict rule forbidding the interference of a third party with the possession of the receiver, without leave of the court, applies without regard to the fact, whether such party claims paramount to or under the right which the receiver was appointed to protect (High on Rec., sec. 139; Evelyn *vs.* Lewis, 3 Hare, 472)."

The doctrine here laid down is simply an amplification of what is said in 2d Daniel's Chan. Pl. and Pr., 1431, 1433 (3d Amer. from 3d Eng. ed.):

"A receiver appointed by this court is appointed on behalf of all parties, not of the plaintiff or of the defendant only; therefore if any loss arises from deficiency in his accounts, the estate must bear it. The effect of the appointment, however, is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it, and when the party entitled to the estate has been ascertained, the receiver will be considered as his receiver.

"The rule that the possession of a receiver is not to be disturbed extends even to cases in which he has been appointed expressly *without prejudice* to the rights of persons having prior estates, and the individuals having prior estates must, if they wish to avail themselves of them, apply to the court to bring an ejectment or to be examined *pro inter esse suo*, and this although their right to take possession is clear. In this respect there is no distinction between possession by a receiver and that by sequestrators under a commission of sequestration."

II.

The decree of the general term of December 11, 1883 (120, 121, 122), *did not direct or authorize the sale of the property by Tyler as trustee while he had possession of it as receiver of the court.*

Just what was intended by the court in general term when by the decree in question it appointed Tyler receiver, " with power, until a sale shall be made under the said deed of trust, to take and hold possession of said real estate," etc., must be gathered from the decree itself and from such parts of the record as are proper to be considered in determining that question. No justice of the supreme court of the District of Columbia who took any part in the determination of the original case of Keyser against Hitz has had anything to do with the present case. Mr. Justice Cole, who heard this case in the special term of the supreme court of the District, was appointed to that court after the institution of the present suit, and before this case was decided in the special term of the supreme court of the District the appellate jurisdiction of the court in general term had been transferred to the new Court of Appeals.

It will be observed that the appeal taken by Mrs. Hitz from the decree of the general term of December 11, 1883, was allowed in the body of the decree (122). The court therefore knew when the decree was signed that the case would come to this court, and that the property must be held until this court should act. The situation was precisely what it was when Mr. Justice Wylie entered the decree in the special term in favor of Mrs. Hitz and an appeal was taken from his decree to the court in general term. He made Keyser trustee of the court to collect the rents and profits pending the appeal. The general term simply substituted Tyler for trustee in place of Keyser pending the appeal to this court. Therefore Tyler was directed (121):

(1.) To take and hold possession of the real estate in question.

(2.) To rent and manage the same, and to collect the rents and profits and to apply the same to the payment of the taxes, insurance, and other proper expenses.

(3.) From time to time to pay the residue of the rents and profits into court.

(4.) From time to time to make report to the court of the manner in which he had discharged his trust.

If it was contemplated that the property should be immediately sold, there would have been no necessity for these cumbersome provisions. In that case the sale would have been made in a few days, and there would have been no occasion for the receiver to pay the rents and profits into court, or to pay taxes, or to make report from time to time of his doings. In that case he would not have collected more than one, or at most two months' rent. The provisions of the decree regarding the trustee's duties are familiar ones when a receiver is appointed to take charge of real estate for a long or indefinite period.

The penalty of Tyler's bond as receiver is significant in this connection. He was required to give a bond in the sum of $5,000 (121, 122). The gross rents of the property during the five preceding years, when it had been in the possession of Keyser first as bank receiver and afterwards as court receiver, averaged only about $213 per month (130, 131, 132).

In consideration of these provisions of the decree and of the improbability, to say the least of it, that the court in general term would deliberately authorize Tyler, pending the hearing of the cause by this court on appeal, to dispose of or part with the possession of the property and put it

beyond the process of this court, it would seem to be indicated clearly enough that what was really intended was that Tyler should remain in possession as receiver pending appeal to this court, just as his predecessor, Keyser, had remained in possession pending the appeal to the court in general term.

Taken in their connection with the other language of the decree, so as to give proper effect to all of it, the words "until a sale shall be made under said deed of trust" can only refer to a possible sale thereafter, to be authorized by the court if the final result of the litigation was found to justify such an order or if the result of the litigation was to entirely lift the hand of the court from the property by the final and lawful termination of the receivership. To attempt to construe these words as authorizing a sale before the result of the litigation was ascertained and while the property was still in the hands of the court is to attempt to give them a wholly forced and unnatural meaning.

The decree does not direct Tyler to turn the property over to any particular person. It does not state whether the property is to be turned over to the purchaser as soon as the property is knocked down to him, or when he makes the deposit required at such auction sales, or when he has paid the purchase price in full. The terms of the sale were not then known. It might well have been that the property would have been sold for part cash and part deferred payments. Was Tyler to determine for himself whether the property should be turned over when the cash payment was made, or whether he was to hold it until all the deferred payments had been made? These and numerous other questions would necessarily have arisen and would have been answered in the decree if the court had contemplated that, without further action by it, Tyler should give up possession of the property.

It is not by any such slipshod phraseology as is relied upon in this connection by the counsel for the appellees that

courts of equity discharge receivers and authorize them to part with the property which they hold for the court.

In Ferguson *vs.* Dent (29 Fed. Rep., 1) a receiver holding property was directed by the final decree to turn it over to one of the parties who by the decree was entitled to it. An attempt was made to supersede this decree, but the bond was fatally defective by omitting the words "and damages." Thereupon the clerk issued a formal order to the receiver to carry the decree into effect by delivering possession of the property in accordance with the decree; but the court revoked this order, holding that it was the duty of the receiver to retain possession until he received a special order of the court to deliver it up; *that a direction in the final decree to deliver it up is not sufficient, whether there is a supersedeas or not.*

So in 2d Daniel's Chancery Pl. & Pr. (3d Am. from 3d Eng. ed., 1447) it is said:

"A receiver, however, is never discharged by decree; but the application for his discharge is usually made by motion, notice whereof should be served on all parties, and the order runs thus, 'That the receiver be discharged from being such receiver, and that he do forthwith pass his final account and pay the balance reported due into the bank or to the person entitled to receive it.'"

And in Beach on Receivers, section 796, it is said:

"The end of the suit—its final adjudication—gives cause for the discharge of the receiver, but does not, *ipso facto*, effect his discharge, which results only from an order or decree of the court so directing. After the settlement of the suit the receiver must have time and opportunity to prepare and present his accounts, and for the adjustment of the details of the receivership; and for such purpose only should he be continued in office after a final decree in favor of the defendant, unless there be an appeal."

In the present case Tyler, as receiver, was never discharged. More than a year after the sale the court in gen-

eral term treated him as still receiver by directing him as such to take the fund in the registry of the court and apply it to the payment of taxes on the property (134). There is nothing in the case to even show when it was that he gave up the possession of the property or even to whom he turned it over.

It must be remembered that as long as the property was in the hands of the receiver Mrs. Hitz could neither sell nor mortgage it for the purpose of raising money to pay the debt due Jenks. Nobody would buy it from her and nobody would lend her money upon the security of it while it was in the custody of the court through its receiver. If the receiver had been directed to turn over the possession of the property to himself as trustee, or to Jenks, or to Mrs. Hitz, and had then allowed it to be sold, Mrs. Hitz might have been able to save her property. But the decree of the general term, if properly construed by the court below, rendered her helpless even while the advertisement of the sale was running in the newspapers. It certainly is unusual and extraordinary for a court through its receiver to hold possession of real estate while it is being sold by some person acting under an authority not emanating from the court. We submit that it is at least doubtful whether the general term had the power to do this in the present case.

But, on the whole, it is respectfully submitted that the decree of December 11, 1883, properly construed, did not direct, authorize, or permit Tyler, as trustee, to sell the property which he held as receiver.

III.

If the decree of December 11, 1883, *did authorize or permit Tyler, as trustee, to sell the property which he held as receiver, the superseding of that decree rendered such authorization or permission nugatory, and the sale made under it was absolutely void.*

The case of Goddard *vs.* Ordway (94 U. S., 672) would seem of itself to be decisive of this question. In that case a bill in equity had been filed, by which the complainant sought to have the defendant compelled to pay to him, from time to time, as received, a certain proportion of sums of money paid to the defendant monthly by the Government on a contract for furnishing granite for the erection of the State, War, and Navy Department building in Washington. Pending the suit a receiver was appointed, who collected, from time to time, the proportion of the monthly receipts from the contract which was claimed by the complainant. In the supreme court of the District, in special term, a final decree was made in favor of the complainant. In the general term this decree was reversed. The bill was dismissed and the receiver was directed by the final decree to pay over to the defendant the fund in his hands as receiver. An appeal having been taken to this court and a supersedeas bond having been duly approved and filed, the defendant nevertheless made application to the general term to have the money paid over to him, on the ground that the supersedeas did not affect that part of the decree which required that to be done. Thereupon the complainant applied to this court for relief, and it held that the supersedeas put it beyond the power of the court below to part with the fund pending the appeal. The reason for this conclusion is thus stated in the opinion of this court, which was delivered by Mr. Chief Justice Waite:

"When this appeal was taken, the only execution there could be of the decree below was the collection of the costs and the delivery to the defendant of the fund in court, which is the subject-matter of the litigation. To that end, a further order was asked; but such an order would be in aid of the execution of the decree which has been stayed, and consequently beyond the power of the court to make until the appeal is disposed of. While the court below may make the necessary orders to preserve the fund, and direct its receiver to that extent, it cannot place the money beyond the control of any decree that may be made here, for that would be to defeat our jurisdiction."

Although Goddard *vs.* Ordway was urged upon the Court of Appeals as conclusive of the question presented to it in this case, the following is all that is contained in the opinion of the Court of Appeals in reference to that case:

"The case of Goddard *vs.* Ordway, 94 U. S., 693, which is principally relied on by the appellant in this connection, presented a very different condition. There, after appeal taken and supersedeas bond given, it was sought in the court below to discharge the receiver and to require him to turn over to the successful party in that court the money previously collected by him as such receiver. This was in the nature of execution of that decree, and this the Supreme Court held should not be done. But that plainly was a very different case from the present. It was not pretended in that case that the receiver should still go on collecting, as though, in consequence of the appeal and supersedeas, the decree had not terminated the further exercise of his functions. There is a very great difference between the conservation of a fund already collected in order to await a final decision on appeal, and the continuance of further collections which might have been made, if the decree had been different."

We think we have shown above that the decree of December 11, 1883, cannot be properly construed as directing Tyler, the new receiver, to turn over the property to somebody else in advance of the action of this court on the appeal which was embodied in that decree. But even if it

did contain such a direction, we cannot see that the foregoing paragraph from the opinion of the court below contains any answer to our contention that the supersedeas nullified such direction. The only supposed distinction between this case and Goddard *vs.* Ordway pointed out in the paragraph in question is that that case contemplated the conservation of a fund already collected and not the continuance of further collections. If in this case Tyler had declined to go on collecting rents after the appeal and an application had been made to the court to compel him to perform his duty in that regard, the suggestion that we are considering might have been pertinent, but we cannot see what it has to do with the question whether, despite the appeal and supersedeas, he could put the property itself out of the control of the process of this court. In Goddard *vs.* Ordway, the defendant Ordway denied that the complainant had any right to the fund. The general term sustained his contention, and in the decree dismissing the bill explicitly directed that the receiver should turn over the fund to the defendant. In this case a defendant claimed a lien on the property which the receiver held, and the decree (as construed by the Court of Appeals, not by us) authorized the receiver to turn over the property to the purchaser at a sale to be made to enforce the lien. If the supersedeas stopped the turning over of the property in the one case, why did it not stop it in the other? In both cases the whole object of the supersedeas was to require the court below to retain possession of the property in controversy pending action by this court, into which the whole case had been removed.

Counsel for the appellee contend that the counsel for Mrs. Hitz should have procured an order from the court in general term or from this court directing the receiver to hold the property pending the appeal, but by the statute regulating supersedeas on appeal to this court (section 1007, R. S. U. S.) no such order is needed when the appeal is taken or the writ of error sued out and the supersedeas bond is

duly approved and filed. As is said by Judge Hammond in a note to Ferguson *vs.* Dent (29 Fed. Rep., 1):

"The order for supersedeas comes by an implication from the statute addressed alike to both the appellate court and the court below."

So, in reply to a similar suggestion, this court said in Goddard *vs.* Ordway, *supra:*

"The supersedeas is not obtained by virtue of any process issued by this court, *but it follows as a matter of law* from a compliance by the appellant with the provisions of the act of Congress in that behalf."

If the conclusion of the Court of Appeals as to the limited scope of the principles laid down in Goddard *vs.* Ordway be correct, it would follow that in no case where real estate is held by a receiver in a Federal court will the parties in interest have any right to have the property retained by the court pending an appeal and supersedeas from a final decree in the court of original jurisdiction. That court could at its pleasure put the property where it would require a new suit to bring it again within the control of the higher court. We submit that not only by Goddard *vs.* Ordway, but by numerous other cases, this court has established the true rule to be that in such cases the inferior tribunal cannot thus "defeat the jurisdiction" of the superior court, and that if anything more is contemplated than preserving the property—or, perhaps, in some cases converting it into money to be held in place of the property itself—permission of the appellate tribunal to which the cause has been transferred must first be obtained.

In the Rio Grande, 23 Wallace, 458, it was held (p. 463) that where, in an admiralty case, a vessel had been taken into custody in the court below and an appeal was pending from its decree, "the appeal stayed the proceedings and the

parties were bound to keep the vessel where it then was, to wit, in the possession of the court. * * * The removal of the vessel pending an appeal to the circuit court was illegal and in violation of the express directions of the statute regulating appeals." The statute referred to provided that, upon sufficient security and notice being given within a certain time to prosecute an appeal with effect, the appeal should be a supersedeas and stay execution.

In Draper *vs.* Davis, 102 U. S., 370 (which, as shown by the report of the same case in 104 U. S., 347, was an appeal from a decree of the supreme court of the District of Columbia directing a sale of real estate), it was held that a supersedeas bond having been filed in time, the court below was "without power at this time to proceed with the execution of the decree appealed from."

In Grant *vs.* Phœnix Mutual Life Insurance Company, 121 U. S., 118 (which also came to this court from the supreme court of the District), a large amount of real estate in the city of Washington had been placed in the hands of a receiver pending a suit in which the rights of a number of conflicting claimants, setting up liens on the real estate or different parts of it, were involved. There was a final decree in the general term appointing a trustee to sell the real estate and bring the proceeds into court, from which Grant, the owner of the property, appealed to this court. (See the case as reported in 121 U. S., 105–111.) Grant afterwards appealed from a subsequent interlocutory order authorizing the receiver to make certain repairs and "to put in proper working condition the machinery and apparatus used in supplying the house with water." This court sustained the interlocutory order on the sole ground that, although there had been an appeal and supersedeas, the order appealed from "was strictly confined to the preservation of the property in litigation."

In Bronson *vs.* La Crosse R. R. Co., 1 Wall., 405, a district court of the United States, in a case in which it had ap-

pointed a receiver to take possession of and operate a railroad, undertook, pending an appeal to this court from a final decree which had been superseded, to turn a part of the road over to a company which was not a party to the suit, and to dispose of part of a fund in the hands of the receiver. This court held that the district court had overlooked the effect of the appeal and was acting upon a misapprehension of its powers and without authority of law.

IV.

DEFENSES.

RES ADJUDICATA.

It will no doubt be again asserted that the complainant is concluded as to the validity of the sale in question by the subsequent proceedings in the case before the auditor and by the court in reviewing the auditor's report; that these proceedings were equivalent to a hearing and determination of that question in favor of Jenks by the auditor, the supreme court of the District, and this court. That such assertions are incorrect and founded upon an entire misapprehension of the nature of the proceedings before the auditor, we think will clearly appear.

The final decree of December 11, 1883, in the general term, was entered more than three months before the sale, and of course under that decree no question could arise as to the validity of the sale subsequently made. The leave given the parties in that decree to litigate further in the case referred to the rents and profits which Keyser had received or should have received prior to the decree in the general term (121).

The formal reference of the case to the auditor for the purpose of stating Keyser's account under the decree in

the general term was not made until the 13th of November, 1884, nearly eight months after the sale, and that reference, like the provision of the final decree in pursuance of which it was made, referred solely to the rents collected by Keyser during his receivership (124), which terminated in January, 1884, shortly after the decree in the general term was entered (132). This order of reference simply directed the auditor to report as to the proper distribution of such funds as might be found for distribution in the cause, and that in making such distribution the auditor should inquire and report as to whether or not any, and, if so, what, taxes should be paid out of the fund. There is not a word in the record to indicate that when this order was made the court knew that the sale had taken place. The report of the auditor made in pursuance of this reference showed that Keyser was chargeable for rents collected prior to the 15th of December, 1881, when he was appointed receiver in the cause, with the net sum of $6,175.95 (131). For rents collected after that date and prior to the time he turned the property over to Tyler, as receiver, after deducting proper charges, the auditor found a balance in the hands of Keyser amounting to $2,804.56 (133).

As to the application of the balance of $6,175.95, rents collected by Keyser while he was acting as receiver of the Garman-American bank and not as receiver appointed by the court, the auditor made no distribution or recommendation, stating that he left "that portion of the distribution to be passed upon by the courts as involving the relative rights of Mrs. Jane C. Hitz and the complainant [Keyser]" (126). As to the balance of $2,804.56 of the rents collected by Keyser as receiver of the court, the auditor found that it should be paid to Mrs. Hitz (133).

Upon exceptions filed by both parties, the auditor's report came on to be heard in the general term in the first instance. That court on the 13th day of July, 1885, made another decree in the case, by which it found that the taxes

and assessments which had accrued on the property prior to January 1, 1879 [Keyser, as receiver of the bank, took possession of the property in December, 1878 (130)], with interest added, would more than absorb the balance of the fund in the registry of the court, and directed that the whole of the fund in court be applied toward the satisfaction of all the taxes and assessments and interest thereon mentioned in Schedule C of the auditor's report (132). Upon examination of this Schedule C (132, 133) it will be seen that the principal of the taxes included therein was over $2,800, and that with interest at 10 per cent. added on the respective items, as the schedule provides, the taxes included in this list would more than absorb the entire fund referred to in the decree of the court. The Court of Appeals in its opinion refers to this fact (340). This list of taxes ends with the tax for the half year ending December 31, 1883. Hence this adjudication did not in any respect touch any question arising out of the sale which was made in March, 1884. It merely held that the deed of trust creditor, while the property was in the hands of the court, after default, was entitled to have the net rents applied to keep down taxes. This decree of July 13, 1885, was affirmed by this court.

But it is insisted by counsel for the appellees in this case that it is shown by the *opinions* of both the court in general term and this court upon this question of the application of the funds in the registry of the court that it was determined that the sale was valid, so that that question is no longer an open one and cannot be considered in this case because it thereby became *res judicata*.

It is true that in the report of the auditor (128), in the opinion of the general term (4 Mack., 179), and in the opinion delivered by Mr. Justice Gray in this court (123 U. S., 297, 306) reference is made to the sale as a fact. The auditor found that the balance of the fund in the registry was payable to Mrs. Hitz (129), so that whatever adjudica-

tion he made was in Mrs. Hitz's favor and need not be further considered. In the opinion of the general term, delivered by Mr. Justice Merrick (4 Mack., 179), it was held that where a court of equity has appointed a receiver of mortgaged premises the rents and profits collected by the receiver, pending the litigation, will be applied to the payment of the mortgage debt when "the corpus fails to satisfy the lien of the mortgage or the deed of trust." The opinion proceeds to say that the rents received by Keyser after he was appointed receiver by the court "will be dedicated, first, to the payment of the arrears of taxes as stated by the auditor, both the past taxes, the current taxes, and the taxes in arrears, and whatever is left after paying those taxes will go to the payment of the balance of the debt secured by the deed of trust."

So in the opinion of Mr. Justice Gray in this court (123 U. S., 297) it is said that since "the sum obtained for the land at a sale under the power contained in this deed proved insufficient by more than the whole of the fund in court to pay the debt of Hitz to Jenks secured by this deed, it was rightly held that Mrs. Hitz had no right as against Jenks to any part of this fund. This, however, disposes of the case independently of the application of part of the fund to the payment of taxes accrued during the pendency of this suit."

In this last sentence, Mr. Justice Gray seems to have understood that only a part of the fund had gone to pay taxes, whereas it had all been applied to the payment of taxes that had accrued before Keyser turned the property over to Tyler.

It will be seen, then, that what was decided by the general term and affirmed by this court was that, without reference to whether or not the property should sell or had been sold for enough to pay the debt due Jenks, accrued taxes and assessments on the property and interest thereon were to be first paid from the rents, and that if there was anything left after the payment of these taxes and assessments it should be applied

to make good the deficiency in the debt arising from the sale of the property for less than enough to pay the debt, interest, and taxes. It also appears that, as a matter of fact, the whole fund was absorbed in the payment of the taxes and assessments. There was then, so far, no opportunity in the case to raise the question whether a surplus should go to Mrs. Hitz, or go to Jenks as a credit on account of the debt as if there had been no sale, or go to Jenks to make up the deficiency arising out of a sale. Suppose, for instance, that Mrs. Hitz had undertaken to say to the court in general term when this account was before it on the auditor's report that the sale was void, and that the surplus over and above the taxes, assessments, and interest should have been paid to her or should have been held by the court to await a valid sale to see whether there would be any deficiency, the obvious reply would have been, there is no surplus, and courts do not sit to determine moot questions.

These taxes had to be paid in the interest of all the parties claiming any right in the property. Whether the deed of trust to Tyler was valid or void, the taxes and penalties were running on and constituted a first lien on the property. We concede that the opinion rendered in a case by an appellate court may be examined for the purpose of clearing up ambiguities in its judgment or decree, but we deny that anything contained in an opinion filed by such a court can apply to the adjudication of a question which was not made up by the record before it, and which could not by any possibility have been made up.

All that either the general term or this court said on this subject was that there had been a sale. This was a fact, as to which there was no controversy. The question involved here is whether that sale was valid. That question was not presented in the former case, and therefore was not decided. It certainly is not a question which is to be considered as having been adjudicated because it might have been raised, because the fund in court was absorbed by

the payment of taxes and assessments accruing prior to the sale in pursuance of a decree made by the court three months before the sale, and no implication can here arise that certain questions might have been raised as to the application of a surplus which never existed.

The appeal of Mrs. Hitz to this court from this decree of the general term of July 13, 1885, was noted by the presiding justice at the foot of the decree itself (135). There was, however, no supersedeas of this decree. While the case was pending on appeal in this court, Tyler, on or a few days prior to August 4, 1885, went into the auditor's office and filed with that officer an account of the rents received by him from the beginning of his term as receiver, December 12, 1883, until the sale of the property was consummated, on the 26th day of March, 1884, the amount so collected by him being $709.96, from which he claimed and was allowed a deduction of $94.74 on account of repairs and his commissions (145). He was also allowed a commission on the fund which he had received from the registry of the court under the decree of July 13, 1885, amounting to $115.90. The result was that there was a balance in his hands of only $402.07. On the 4th of August, 1885, the auditor filed his report in which he stated that he treated this balance of $402.07 "as payable to W. P. Jenks upon account of the deficiency in the payment of his indebtedness by the sale under the deed of trust" (146). The report so filed was never acted upon by the court, and, so far as this record discloses, was never brought to the attention of the court or of any of the parties in interest until after the present suit was begun.

The testimony taken in this case tends strongly to prove that counsel for Mrs. Hitz was never notified of this proceeding before the auditor or of the filing of the auditor's report (85–88). In the court below, counsel for the defendants argued that this proof was insufficient to establish the fact of

want of notice, and no doubt that argument will be repeated here. It is respectfully submitted that no such proof was necessary; that he who claims that his adversary is estopped by a former judgment is bound to show affirmatively that that adversary had notice of the prior proceeding; that in some way he was afforded an opportunity to know what claim was made against him, and given an opportunity to meet that claim.

It must not be overlooked that *when the proceedings before the auditor on both references took place, and when the court in general term took action on the first report, the appeal taken from the decree of the general term of December* 11, 1883, *was pending in this court.* That appeal involved the validity of the deed of trust to Tyler. A supersedeas had been obtained and (unnecessarily) actual notice of the filing of the supersedeas bond had been given to Tyler (9). This was fair notice to Tyler and to his principal, Jenks, that his right to sell pending the appeal was contested. How could it be expected that before this court should decide the main question Mrs. Hitz should do anything further? She could not file a bill attacking the sale on the grounds now relied on, for that would be to assume that there was a deed of trust—the very thing she was litigating. Her contention before the auditor was not that the sale was void, but that, sale or no sale, she was entitled to the rents till the creditor secured by the deed of trust, or his trustee, took possession. The court held that when *it* took possession the creditor was entitled to the intervening rents if it was found that his deed of trust was valid. Everybody saw that if the court should so decide the rents collected by Keyser as receiver of the court would go to Jenks. It was not till Tyler filed *his* report as receiver that there was any surplus over taxes, and when that report was before the auditor there were, as we have seen, no parties before him. Tyler conducted that proceeding alone, and could bind no one by

what he did. No court or judge has taken any action on Tyler's report.

And even if both Mrs. Hitz and Jenks had appeared before the auditor when Tyler's account was being considered, it is hard to see how any question as to the validity of the sale could have been adjudicated. The main case, involving the question whether there was any deed of trust at all, was still pending on appeal in this court, and the question of whether there had been a valid sale under a deed of trust would have had to remain in abeyance pending the determination of the principal controversy.

Again, the controversy before the auditor was as to the distribution of certain sums of money. All that was adjudicated was that the back taxes on the property should be paid as far as the fund in court would go. The controversy now is as to the validity of the sale. Therefore only what was *actually* put in issue and decided in the one case is *res judicata* in the other. The fact that Mrs. Hitz, before the auditor, *might* have objected to the validity of the sale (even if that were the case, which we think we have shown it was not) does not in any way impair her right to raise that question now in a suit upon a different claim or demand.

Cromwell *vs.* County of Sac, 94 U. S., 351, was an action on certain bonds and the coupons thereto attached issued by the county of Sac, in the State of Iowa. There had been a former suit between the same parties upon other coupons of the same bonds, and the question was whether in the second suit the county was concluded as to defenses which might have been set up in the former action, but which were not so set up. In the opinion of the court it is said, upon page 353:

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases,

therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Nesbit *vs.* Riverside Independent District, 144 U. S., 610, was an action upon certain school district bonds. In that case, too, there had been a former suit between the same parties upon coupons attached to some of the same bonds. In the first suit, the defense had been made that the bonds were invalid because they were in excess of the amount allowed by law. In the second suit, the defense set up was such invalidity coupled with knowledge of the same by the plaintiff when he acquired the bonds. The first suit was decided in favor of the plaintiff; the second in favor of the defendant, upon the ground that the causes of action being different in the two cases, the defense growing out of knowledge on the part of the plaintiff of the invalidity of the bonds not having been raised in the first action, the defendant had a right to raise it in the second, notwithstanding the fact that he might have relied upon it in the first suit, and might in that way have defeated the original action. In this case Mr. Justice Brewer, after referring to and affirming the decision in Cromwell *vs.* County of Sac, remarks that it was well said in that case that:

"'Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount, or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting, in a subsequent action, other demands arising out of the same transaction'" (p. 620).

Dennison *vs.* United States, 168 U. S., 241, was an appeal from the Court of Claims in a suit brought by a supervisor of elections to recover certain fees and disbursements. He had succeeded in a former suit in the Court of Claims, which involved not the same items as those involved in the second suit, but similar items. In the first suit the court had passed on his claim as a whole. Defenses which might have been made to particular items were not in fact made. Hence it was held, following Cromwell *vs.* County of Sac, that the Government was at liberty in the second suit to make objections to particular items which were in all respects like those which had been involved in the former suit, and those objections were sustained.

"The rule has always been regarded as well settled, from the earliest authorities down to the present time, that the judgment, either of a court of concurrent jurisdiction or of a court of exclusive jurisdiction, is not conclusive of any matter which was incidentally cognizable in that action, or which came collaterally in question, nor of any matter to be inferred by argument and construction from the judgment."

2 Black on Judgments, sec. 611.
Duchess of Kingston's case, 20 How. St. Tr., 538.
Russell *vs.* Place, 94 U. S., 606.
3 Smith's Leading Cases, pp. 2008, 2082.

On all the foregoing grounds, we submit that the question whether the sale of this property by Tyler, trustee, was a valid one is before this court wholly unembarrassed by any former or other adjudication.

AS TO THE DEFENSE OF LACHES.

The question to be considered here is what application, if any, has the doctrine of laches to a bill filed to set aside a *void* sale made by a trustee under a deed of trust?

In the first place, ordinarily the remedy of a party adversely affected by a void sale of real estate would be at law.

If in possession, he could put the purchaser at such a sale to his remedy by ejectment and could set up the defense that the purchaser took no title under the sale at any period of time, however distant. If the purchaser should have been put in possession, the legal owner could himself bring ejectment at any time within twenty years without any regard to the death of parties, the loss of evidence, or fluctuations in value (Phelps *vs.* Harris, 101 U. S., 370, 375; Mackall *vs.* Casilear, 137 U. S., 556, 564).

Mrs. Hitz is prevented in this case from pursuing her remedy at law by ejectment only by the fact that by the deed of trust the legal title became vested in the trustee Tyler. Her equitable title she must assert in a court of equity. Our contention is that in this state of affairs a court of equity will be governed by the analogy of the statute of limitations at law, and that it is not a case where the doctrine of laches has any application whatever.

The leading case in this jurisdiction on this subject is Elmendorf *vs.* Taylor, 10 Wheat., 152–168. There a bill in equity was filed to obtain a conveyance of land held under a grant prior to the one under which the complainant claimed. The suit was not brought until over twenty-one years after the complainant had obtained his patent. Those under which the defendants claimed were of an earlier date. The whole question in the case was whether the case was governed by the analogy of the twenty years' statute of limitations applicable to suits in ejectment or by the thirty years' statute applicable to writs of right. The opinion delivered by Chief Justice Marshall carefully reviews the authorities, and reaches the conclusion that in such cases a suit in equity is barred in twenty years.

This principle was also applied in Hughes *vs.* Edwards, 9 Wheat., 489–497, in which it was held that, in suits by the mortgagee to foreclose a mortgage as well as in bills by the mortgagor to redeem, equity applies the statute of limitations relating to actions of ejectment. And in that case the

rule was applied in the case of a purchaser from the mortgagor. The court says:

"The mortgagor after forfeiture has no title at law and none in equity, but to redeem upon the terms of paying the debt and interest."

In both the foregoing cases it will be seen that there was no remedy at law. There was not in either case concurrent jurisdiction at law and in equity. In every material feature Hughes *vs.* Edwards was like the case at bar, so far as the questions of limitations and laches are concerned.

Cooksey *vs.* Bryan, 2 App. Cas. D. C., 557, was a suit in equity to establish a resulting trust. Mr. Justice Morris, in delivering the opinion of the court, said:

"Under the peculiar circumstances of this case, we cannot regard the defense of laches as available against the heirs of the wife. While, as we have already stated, we must regard with great suspicion an attempt to declare a resulting trust in a transaction that for thirty years and upwards has presented no indication of any such trust, yet it is not to be forgotten that the statute of limitations would not have barred an action of ejectment in this case, if the heirs of the wife had been put to such action; that her disability of coverture precluded the running of the statute during the time of the joint lives of herself and her husband; that the period of ten years allowed for the institution of such a suit by the statute of limitations after the removal of the disability had not elapsed when this bill was filed; and that the very natural mistake of Mrs. Doniphan in supposing herself the owner of the property under the will of her husband, although to some extent only a mistake of law, might very well be regarded as a sufficient excuse for her failure to institute any legal proceedings for the assertion of her rights during her lifetime" (p. 569).

Sis *vs.* Boarman, 11 App. Cas. D. C., 116, was a suit to foreclose a mortgage, which suit was begun more than nineteen years after the maturity of the debt secured by the deed of trust. The reason for resorting to equity was that the

trustee was dead, and one of his heirs was absent from the District of Columbia and his residence was unknown. Among others the defense of laches was relied upon. Mr. Justice Morris, in delivering the opinion of the court, goes at a good deal of length into the authorities, and shows that in such cases the courts of equity are governed by the statute of 21 James I, chapter 16, prescribing the period of twenty years within which an action of ejectment must be instituted.

In Dugan *vs.* Gittings, 3 Gill, 138, a father had verbally promised to give a certain dwelling-house to his daughter upon her marriage; she married relying upon the promise, and with her husband was put in possession of the property by her father. The father lived twenty years afterward without having conveyed the property to his daughter. Nineteen years after his death the daughter filed a bill to have the contract specifically performed. It was held that up to the time of the father's death the husband was entitled to the possession as tenant by the curtesy, therefore the daughter's right to bring the suit did not occur until the father's death; that the analogy of the statute of limitations relating to ejectment governed the case, and that the bill was filed in time.

In Hagerty *vs.* Mann, 56 Md., 522, one of two sureties on an administration bond died, and his estate was settled up and distributed. One of the next of kin, after having sued the remaining surety and obtained judgment against him, execution upon which was returned *nulla bona*, filed a bill against the distributees of the deceased surety to reach in their hands the property that had come to them from the estate of that surety. It was held that such a suit might be brought at any time within twelve years after the expiration of the thirteen months allowed for the distribution of the personal estate of a testator; that an action at law might have been brought on the bond at any time within twelve years after the cause of action accrued, and

that equity would apply the same rule. The court on this subject say, at page 527:

"The defendants have not suffered by receiving money they might not have received if the suit had been brought sooner. They will be no worse off by being obliged to pay the funds they have received than if they had been prevented from receiving them; and in the meantime they have had the use of the money, which they certainly cannot complain of. We can find no case situated like this, or involving circumstances like this, where a party has been held to the rigid rule here sought to be imposed upon the complainant. Most of the cases which have been cited involved a vastly greater period of delay than that in this case; and the cases in which any similar or shorter period was held to involve laches were cases in which parties were under peculiar obligation to act in order to prevent rights of strangers from vesting or attaching, which would not otherwise vest or attach, as in the case of Mason *vs.* Martin, 4 Md., 124, in which objections to the purchase of a trustee at his own sale, were made after two years, and it was held were made too late; and in the case of Clabaugh *vs.* Byerly, 7 Gill, 354, where a party gaining knowledge of circumstances giving him the right to sue, and not acting for seventeen months, was held to have acquiesced. But none of the cases have held that a party who holds a claim which gives him a fixed time within which to sue at law, and having the full period allowed him in which to commence proceedings, has been held to a more rigid restriction in equity, especially when the remedy at law has been lost by accident, unmixed with the fault of the party complainant."

In Manning *vs.* Hayden, 5 Sawyer, 360, an attorney at a judicial sale had bought in, in his own name, property of his client. Two bills were filed by the client to get the property back, one being filed in nine years and the other in eleven years after the defendant had disavowed the trust and given notice that he intended to hold the property as his own. The case was heard before Sawyer, circuit judge, and Deady, district judge. The latter, in the course of the opinion, says that the case had been very thoroughly argued

by able counsel, and had been considered by the court with great care. It was held that the analogy of the twenty years' statute of limitations of law applied to the case. In the opinion, on page 379, it is said:

"In the consideration of purely equitable rights and titles, courts of equity act in analogy to the statute of limitations, but are not bound by it. As was said in this court in Hall *vs.* Russell, 4 Sawyer, 515: 'When an action upon a legal title to land would be barred by the statute, courts of equity will apply a like limitation to suits founded upon equitable rights to the same property. So in cases of implied or constructive trusts, when it is sought for the purpose of maintaining the remedy to force upon the defendant the character of a trustee, courts will apply the same limitation as provided for actions at law.' Citing Elmendorf *vs.* Taylor, 10 Wheat., 176; Miller *vs.* McIntyre, 6 Pet., 66; Beaubien *vs.* Beaubien, 23 How., 207; to which may be added Wisner *vs.* Barnett, 4 W. C. C., 638; Kane *vs.* Bloodgood, 7 Johns. Ch., 110; and Michoud *vs.* Girod, 4 How., 560. Apply this rule to this case, and this suit may be maintained at any time within twenty years from the fall of 1865, the time when the defendant finally repudiated the arrangement with the Doves, and wrongfully took possession of the premises, that being the period limited by the statute for the commencement of an action at law therefor."

In Cranmer *vs.* McSwords, 24 W. Va., 596–601, certain lands were devised charged with the testator's debts. Other lands, however, were sold to pay the debts. The owner of the land so sold, thirteen years after the sale filed a bill to reach the lands which were charged by the will. It was held that this was purely an equitable remedy; that the statute of limitations had nothing to do with it, but that mere delay for less than twenty years was not sufficient to prevent the plaintiff from maintaining the suit, and that as the principal facts were all established by documentary evidence, laches was no defense. In this case the court quotes in support of its views a passage from the case of

Badger *vs.* Badger, 2 Wall., 93, in which this court, referring to the case of Michoud *vs.* Girod, 4 How., 503, says:

"The facts of the case were clearly established by records and other written documents, and the court were not called on to found their decree on the frail memory or active imaginations of ancient witnesses, who may not be able after a great lapse of time to distinguish between their faith and their knowledge."

In Scherer *vs.* Ingerman, 110 Ind., 433, the supreme court of Indiana uses this language:

"There may be cases of statutory proceedings or cases of purely equitable cognizance where the laches of a party may be of such a character and under such circumstances as will bar his right to prosecute his claim in less time than that fixed by the statute of limitations. But that is only in cases where the laches are of such a character and under such circumstances as to work an equitable estoppel."

In the above case a bill was filed to subject realty to sale to pay the debts of a decedent when the personalty proved insufficient, and it was held that the plaintiff had fifteen years from the time the action accrued to file his bill.

But, assuming that the case is one to which the doctrine of laches applies, what are the facts?

The sale was made on the 26th day of March, 1884. The mandate of this court was not signed until November 14, 1887 (153–155), and it was not filed in the supreme court of the District until February 11, 1889 (155). The bill in this case was filed November 6, 1890, nearly a month prior to the confirmation, on December 1, 1890, of the report of the special auditor appointed to tax the costs, which finally ended the original suit.

Counsel for the appellees will contend that the delay in

bringing this suit ran from the date of the sale to the date of the filing of the bill, which was six years, seven months, and ten days.

But we submit that it is unreasonable and unjust in this computation to take any account of the time during which Mrs. Hitz was engaged in endeavoring to support in this court her claim that the deed of trust under which the sale was made was invalid. If she had succeeded in that contention, the sale would have stood canceled as a matter of course. The deed from Tyler, trustee, to Caldwell and the deed from Caldwell to Jenks would have been so much waste paper. Tyler knew this when he made the sale, and Jenks knew it when, through Caldwell, he became the purchaser. In addition to the notice which was given them by the pendency of the suit to which they were parties, Mrs. Hitz's counsel had given them written notice when the sale was advertised that a supersedeas bond had been filed, which notice could have had no other purpose or effect than that of warning both the trustee and the creditor for whom the trustee was acting, and who subsequently himself became the purchaser at the trustee's sale, that Mrs. Hitz would not recognize the sale, but reserved her right to attack it as void.

In Ensminger *vs.* Powers, 108 U. S., 292, the question was whether a bill of review which was not filed within two years from the entering of the decree which it assailed was filed in time. The original decree in that case was made in December, 1873. In January, 1874, the defendants appealed to this court. In December, 1875, the appeal was dismissed because of the failure of the appellants to file and docket the cause in the Supreme Court, and the bill of review was filed in September, 1876, nearly three years after the original decree was entered, yet it was held that because the pendency of the appeal would have been a valid objection to the filing of a bill of review by the appellants, the bill of review was in time, the court saying:

"While the appeal was pending here, although there was no supersedeas, the circuit court had no jurisdiction to vacate the decree in pursuance of the prayer of the bill of review because such relief was beyond its control. The time during which that control was suspended to await the orderly conduct of business in this court in regard to hearing the appeal is not to be reckoned against Bridget Powers in this case, although she joined in the appeal."

In Pacific R. R. of Missouri *vs.* Missouri Pacific R'w'y Co., 111 U. S., 505, a bill had been filed to set aside a judicial sale in a foreclosure suit for fraud. The sale was confirmed in October, 1876. An appeal was taken to this court, and it affirmed the sale in April, 1880. The bill attacking the sale for fraud was filed in June, 1880, nearly four years after the sale. The court held that there was no laches in filing the bill; that the time during which the appeal was pending could not be counted against the plaintiff.

Even without reference to the fact that the larger part of the delay in this case was due to the fact that the original suit was pending in this court, the bill in the present case was filed within a reasonable time under the circumstances of this case. Mere delay of itself does not prevent the complainant in a suit in equity from successfully asserting his rights. We do not propose to weary the court by reviewing its numerous decisions upon this subject. They all hold, either expressly or by implication, that the defense of laches is sustainable only where it would be inequitable under the particular circumstances to allow the claim to be enforced, whether that delay be for a few months or for many years. Thus, in Penn Mutual Life Insurance Co. *vs.* Austin, 168 U. S., 685, 698, the court say:

"The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect. In other words, where a court of equity finds that the position of the parties has so changed that equitable

relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect."

And in Allore *vs.* Jewell, 94 U. S., 506, 512, the court sustained a bill filed by an heir six years after the death of his ancestor to set aside a conveyance made by that ancestor while infirm and mentally weak, the court saying in reference to the objection of laches:

"The objection of the lapse of time—six years—before bringing the suit cannot avail the defendant. If during this time from the death of witnesses or other causes, a full presentation of the facts of the case had become impossible, there might be force in the objection. But as there has been no change in this respect to the injury of the defendant, it does not lie in his mouth, after having in the manner stated obtained the property of the deceased, to complain that her heir did not sooner bring suit against him to compel its surrender. There is no statutory bar in the case. The improvements made have not cost more than the amount which a reasonable rent of the property would have produced, and the complainant, as we understand, does not object to allow the defendant credit for them."

In the case at bar there has been no material change whatever in the condition, either of the parties or of the property. The principal point upon which this bill attacks the sale of the property by Tyler, trustee, is that the sale was void because the property was in the hands of a receiver, and because, also, no direction or permission to sell had been given by the court, and if such direction or permission had been given its effect had been nullified by the supersedeas. Everything which is to be considered on either of these points not only grows out of documentary evidence entirely, but that evidence is a part of the records of the very court in which the bill is filed. If all the parties to the controversy had died, there would as to this point be no defect of proof whatever.

In the case of Townsend *vs.* Vanderwerker, 160 U. S., 171, 186 (a case which originated in this jurisdiction), a bill was filed to enforce a contract in respect of real estate nearly ten years after the contract was made and shortly after the death of the other party to the contract, yet this court said in that case:

"The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time had elapsed since the cause of action accrued, but whether under all the circumstances of the particular case plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did. In this case we think the delay is fully explained (Gunton *vs.* Carroll, 101 U. S., 426).

It is in evidence—indeed, we may say it is a circumstance of which any court in the District of Columbia would take judicial notice—that during the period in question Mrs. Hitz was harassed by litigation growing out of the connection of her husband with the German-American national bank, and the use which he had made of his wife's property and rights in endeavoring to sustain that tottering institution. Another suit brought against her by Keyser, as receiver of the bank, in which she had obtained judgment in the courts of the District, was reversed by this court on the 6th day of January, 1890, and sent back for a new trial (133 U. S., 138). The proceedings in the original suit against Jenks, in which Tyler was appointed receiver, were not finally terminated until after the bill in the present suit was filed, for as late as June 16, 1890, the taxation of costs in that case was referred to a special auditor for the reason that the situation as to costs was so complex that the necessary investigation would involve an amount of time and labor which it would embarrass the clerk's office to attend to (159). The report of the special auditor was not acted upon by the court until nearly a month after this suit was

begun (162). As a matter of fact, therefore, the first litigation overlapped the second.

The real estate which Tyler sold remains to this day in the same condition in which it was when Jenks purchased it. The rights of no third party are in any way concerned. Neither Jenks nor his children have changed their position in regard to the property since the sale was made. The debt which the deed of trust to Tyler was given to secure, with interest and all proper expenses incurred in paying taxes, insurance, or repairs, will necessarily still be a lien upon the property if this sale be set aside. By such a course justice to everybody can be done. By refusing it the children of Jenks will be left not only entitled to every dollar of their claim, with interest at eight per cent. per annum until paid, but they will also be declared to be the owners in fee-simple of property in equity belonging to Mrs. Hitz. We are therefore unable to see how the court below could make valid a sale that was absolutely void, nor, under the circumstances of this case, ratify the great wrong which Tyler perpetrated when he offered this property for sale while the title was so involved in litigation that a purchase by anybody but his own principal was out of the question.

We submit that the decrees of the Court of Appeals and of the supreme court of the District of Columbia should be reversed and the case remanded with instructions to enter a decree vacating the sale of March 26, 1884; directing an account in which the appellees shall be credited with the debt secured by the deed of trust and all unpaid interest thereon, at the rate of eight per cent. per annum, and charged with the net rents collected from the property since the sale, and giving Mrs. Hitz a reasonable time to redeem by paying the amount thus shown to be due.

A. S. WORTHINGTON,
J. S. FLANNERY,
Counsel for Appellant.

WAYNE MACVEAGH,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 99.

JANE C. HITZ, APPELLANT,

vs.

JOHN STORY JENKS ET AL., APPELLEES.

SUPPLEMENTAL BRIEF FOR APPELLANT.

The brief on behalf of the appellees in this case was not received by counsel for the appellant until the morning of the day the case was reached for argument, so that counsel for the appellant did not even have time to finish reading it before they were summoned to the court. For this reason we asked and obtained leave to file a supplemental brief. The counsel for the appellees were not in fault, as in consequence of an unexpected run on the calendar the case was reached earlier than was anticipated.

As the brief, however, is found to contain some propositions which are entirely new to the case, and others relating to matters which we informed counsel and the court in our original brief we would not raise here, we deem it due to the court as well as to our client that this additional brief should be submitted to the court.

As to the Injunction.

This matter is referred to on pages 8 and 9 of the opposing brief. It is true, as there stated, that we argued in the court below that the supersedeas of the decree of the general term of December 11, 1881, had the effect of continuing in force the injunction then pending and preventing a sale by Tyler under the deed of trust; but in our brief and otherwise we had distinctly notified counsel that we abandoned that contention here. As the matter of the injunction was discussed by counsel for the appellees in the oral argument, and questions in regard to it were asked from the bench, we avail ourselves of this opportunity to explain our position in regard to it.

1. As to the record facts. By one of the prayers of the original bill in the case, which was filed January 10, 1879, Keyser, the complainant, asked for an injunction against Jenks and Tyler from selling the property under the deed of trust (95). On the 21st day of February, 1879, a preliminary injunction was granted in accordance with the prayer of Keyser's bill (96, 97). Mrs. Hitz did not file her cross-bill until October 21, 1879 (107). She did not pray for an injunction (112). Her counsel naturally assumed that it was idle for her to seek to enjoin a sale which stood enjoined already. By the final decree in the special term, which was entered on November 29, 1881, so much of the preliminary injunction as related to the interests of John Hitz as tenant by the curtesy was dissolved (117). The decree in the general term of December 11, 1881, dissolved the preliminary injunction altogether (121). That decree was appealed from and superseded (121, 123).

Our contention in the court below was that the decisions of this court, holding that the supersedeas of a decree dissolving an injunction does not continue the injunction, do

not apply where the original injunction is granted by one court and the decree dissolving it is entered by an *intermediate* court of appeal. We do not now urge this point, and we have stated the situation in regard to it only because counsel on the other side adverted to it in his brief and in his oral argument here.

2. As to the bearing of the foregoing facts upon the question now before this court. We are conceding, it will be seen, for the purpose of simplifying the case as it is presented to this tribunal, that there was no injunction against the sale when the sale was made. We are relying upon the proposition not that there was any order of the court interfering with the sale, but that the court had taken possession of the property, and that a sale could not legally be made by the trustee under the deed of trust while the receiver was in possession. As this matter is vital and was the subject of inquiry by members of the court during the argument, we may be pardoned for submitting the following illustration of what our contention is, and what it is not. Suppose that A has given his promissory note to B and has delivered with it as collateral security certificates of stock in an interest-paying corporation. Afterwards A files a bill in equity against B, setting up that the note and collateral security were obtained from him by fraud, and that he really owes B nothing, and praying that B be enjoined from selling the stock or otherwise enforcing payment of the note. A preliminary injunction issues, which on final hearing is dissolved. From the final decree an appeal is taken and a supersedeas bond duly filed. We are conceding that in such a case B might sell the stock. If A should succeed in reversing the decree, he could go against B for the proceeds of the sale, but the stock itself would be gone. If the decree should be affirmed of course A would have no remedy against anybody. But now suppose further that after the filing of the bill the court ap-

pointed a receiver to take possession of the stock and collect the dividends and to hold both stock and dividends to await the result of the suit, and that by the final decree in the case the bill is dismissed and the receiver directed to turn over the stock in his hands to B. A appeals and supersedes the decree. We contend that in that situation the receiver would comply with the decree at his risk and that the title to the stock would not pass if he should deliver it. This is precisely what was decided by this court in Goddard *vs.* Ordway, 94 U. S., 672, and the other cases referred to on pages 28 and 29 of our original brief.

To meet exactly the present situation we have to suppose a third course: That is, that a receiver has been appointed and has taken possession of the stock and collected the dividends, and by the final decree he is directed not to turn over the stock to B, but to hold it until a sale shall be made by B, and that that decree is superseded. We submit that it is impossible that a decree so worded could have greater effect than a decree that would in positive terms direct the stock to be turned over to B to be sold. Indeed, it is difficult to conceive that any court, while holding the property in its own hands, would attempt to authorize anybody to sell it except for the purpose of bringing the proceeds into court.

The present case differs from the supposed case in this: that the holder of the lien has himself bought the property, and no question arises as to the rights of a third person purchasing in good faith.

Was there any receiver in possession of the real estate involved in this case when Tyler sold it to Jenks?

From the time the bill in the present case was filed until the brief for the appellees in this case was prepared, it had never been suggested by anybody that by any possible view of the case it could be contended that Tyler, as re-

ceiver, was not in possession when Tyler, as trustee, sold the land on the 24th day of March, 1884. But on pages 14 and 15 of the brief for the appellees it is suggested that if our claim as to the effect of the supersedeas is correct, there never was any receiver in the case at all. This result is reached by assuming (1) that Keyser was never appointed receiver, but was in the position of one who held possession of his own property and was directed to pay the rents thereof into the court, and (2) that if the decree of the general term appointing Tyler receiver was superseded, his appointment never became effective.

Manifestly, if either premise of this argument fails, the conclusion falls with it. The fact is that it was expressly adjudicated by the court in general term and by this court that from the 15th day of December, 1881, when the special term modified its decree appointing Tyler receiver, by directing Keyser, who was in possession, to bring the rents into court and to file his bond in the court in the penalty of $5,000, conditioned for the faithful compliance with the order (118), until the decree of the general term of December 11, 1883, Keyser was in possession *as receiver*. From the opinion of the court in general term, reported in 4th Mackey, 179, and the opinion of this court, as reported in 123 U. S., 297, it will be seen that the whole question was whether, during the period just mentioned, the court was in possession of the property through Keyser, as its receiver. Mrs. Hitz was contending that she was entitled to the rents because the mortgagee had never taken possession. Jenks was contending, on the other hand, that when the court took possession, through its receiver, he became entitled to the rents just as though he had taken possession himself. Both courts sustained Jenks' contention. It is sufficient on this point to quote from the opinion of this court as delivered by Mr. Justice Gray (123 U. S., 306). After disposing of other matters the opinion proceeds:

"It only remains to consider her (Mrs. Hitz's) claim to rents and profits. This claim consists of two parts: First, for rents received, with the consent of Hitz, by Keyser, as receiver appointed by the Comptroller of the Currency, of the national bank, from the time of his appointment as such receiver in October, 1878, to the date of the decree of the court below in special term, December 15th, 1881. * * * Second. For rents received by Keyser *under his appointment as receiver by the decree of the court in special term on December 15th, 1881*, and paid by him into the registry of the court, pursuant to that decree, from its date until its reversal in general term on December 11th, 1883. * * * The conclusive answer to this argument is that the accruing rents were not received and held by Keyser by virtue of an agreement with Hitz; *but the court, through Keyser, as its receiver*, took possession of these rents in order to preserve them for the party who should ultimately prevail in the suit."

Indeed, in the brief which was filed in this court in the above case by counsel for Jenks, they used this language:

"Besides, the court had appointed a receiver of the property in question, and had then suspended this appointment and made Keyser (in effect) receiver. Thus it conserved 'not only the *corpus*, but the rents and profits for the satisfaction of the debt'—to use the language of this court in Kountze *vs.* Omaha Hotel Co., 107 U. S., 378–395."

The other premise of the argument of the appellees in this case is equally unfounded. It does not follow at all that because the decree of the general term of December 11, 1883, was superseded that that supersedeas in anywise affected the power of the court below to substitute one custodian of the property for another pending the appeal. Notwithstanding the supersedeas, the court might have had a new receiver every month for the three years during which the case was pending in this court; and there is no question made that Tyler did in fact take possession as receiver immediately after the decree of the general term substituting

him in Keyser's place. On the 13th day of November, 1884, eight months after the sale, the court referred the case to the auditor to state the account of Keyser for rents collected by him "until the possession of said premises passed out of his hands" (124). The report of the auditor shows that Keyser was charged with the rents from December, 1878, until December, 1883 (130, 132), the only amount he was charged with after the latter date being $80.13 in January, 1884, which was, no doubt, money collected by him for rents which had accrued during his term as receiver; and when Tyler subsequently appeared before the auditor in the accounting which he conducted alone, without the aid of, and without notice to, any of the parties to the suit, he charged himself with rents collected "from the beginning of his term of office as such receiver, December 12th, 1883, to the date of the sale of the property in question" (145).

We submit that when counsel, so able and so careful, under such a state of facts, argue to this court on any theory that this property was never in the possession of a receiver at all, it must be because their case to their minds is a desperate one.

The Alleged Recognition of the Sale by the Appellant.

It is insisted on pages 17, 31, and 32 of the brief for the appellees, and was reiterated in the oral argument, that from the time the case was referred to the auditor, in November, 1884, until the decision of this court, in November, 1887, Mrs. Hitz was litigating with Jenks over the question whether the fund in court should be applied to the deficiency in the mortgage debt, and that she fixed the date of the sale as the date to which she was entitled to the rents.

It passes our comprehension how counsel can so mislead themselves. The case was first referred to the auditor by the order of the general term of November 13, 1884, which will be found on page 124 of the record, and that order

confines the reference to an accounting by Keyser for the rents which he had collected before the possession of the premises passed out of his hands (124). The auditor in his report gives in a separate schedule the amount collected by Keyser prior to his appointment as receiver by the order of December 15, 1881 (130). The nêt amount was $6,175.95, and as this money had been distributed by the Comptroller of the Treasury among the creditors of the bank before he was appointed receiver by the court it could not be distributed to anybody (123 U. S., p. 306). The net amount of the rents collected by Keyser subsequent to the order of December 15, 1881, was $3,963.08, and this schedule includes rents from January, 1882, to December, 1883, and the trifling sum of $80.13 hereinabove referred to as of January, 1884 (131, 132). It was this sum of $3,963.08 which was the subject of subsequent proceedings in the court in general term and in this court. The auditor held that this fund could be applied only to the payment of taxes which accrued after December 15, 1881 (129). The decree of the court in general term upon exceptions to the auditor's report filed by all the parties, which decree was made on July 13, 1885, directs that the fund be applied to the payment of taxes that had accrued prior to as well as after the decree in the special term. The decree recites that the taxes which had accrued upon the property prior to January 1, 1879, would more than absorb the balance of the fund, and directs Tyler, as receiver, to take out of the court the entire fund and apply it "towards the satisfaction of all the taxes and assessments and interest thereon," as mentioned in Schedule "C" of the auditor's report (134). This schedule will be found on pages 132 and 133 of the record. This court affirmed the last-mentioned decree. When the question of affirming it was argued here counsel for Jenks, on page 22 of their brief now on file in the case, said:

"Should it be held that the appeal from the disposition of the fund is properly here, and the subject of argument, we shall contend that there was *no error in applying so much of the fund as was so applied to the reduction (pro tanto) of the taxes upon the property.* The trust deed from Miss Crane to Tyler expressly states that it is to secure the payment on demand of all sums that may be advanced by Jenks to keep up 'fire insurance,' and keep down taxes, assessments, &c.—in a prescribed method to be sure—but a method to which the court had, by its injunction, prevented a resort. It was quite right then that the court should use the income of the property *in reducing the burden of taxes* that had accumulated *pendente lite.*"

So that it appears as clearly as any fact in the case that what was decided by the general term and by this court upon the exceptions to the auditor's report was that the fund collected by Keyser before the turning of the property over to his successor in the receivership should not go to Mrs. Hitz, but should *be applied to the payment of taxes on the property;* and counsel for the appellees are entirely wrong, both when they assume that the date down to which the rents collected were in controversy was the date of the sale and when they assume that it was decided that the fund should be applied to meet the deficiency growing out of the sale.

In this connection it is to be observed that, although the order which referred the case to the auditor was not made until November 13, 1884 (124), eight months after the sale, the reference was confined to stating the account of Keyser. If a sale had been made which everybody recognized as valid, Tyler's duties were completed as well as Keyser's, and there was no reason why both accounts should not have been referred to the auditor at the same time. But, whatever the reason, no reference was made of the case to the auditor for the purpose of stating Tyler's account until July 13, 1885, when the general term acted upon the exceptions to the auditor's report on Keyser's transactions. There was then added to the decree of that date a paragraph referring

the case back to the auditor to state Tyler's account as receiver (134); and a few days afterwards Tyler turned up in the auditor's office by himself and obtained from the auditor a report directing him to apply the balance, $380.04, in his hands upon account of the deficiency in the payment of Jenks' indebtedness by the sale under the deed of trust (145–147).

That this *ex parte* proceeding, which was never considered by any court, would not amount to an adjudication that there had been a valid sale is too obvious to require argument. Counsel for the appellees in treating of this subject (see pages 30–32 of their brief) rely entirely upon the proceedings before the auditor and afterwards in the general term and in this court in the settlement of the accounts of Keyser. Nowhere in their brief is there any suggestion, and at no time in the oral argument did they intimate, that the report of the auditor, obtained in this way by Tyler, affected in any degree the right of Mrs. Hitz to raise in this suit the question of the validity of the sale.

Hovey vs. McDonald, 109 U. S., 160–162.

The appellees' counsel insist that Goddard *vs.* Ordway, 94 U. S., 672, if construed correctly by us, has been overruled by this court. On page 29 of their brief they say:

"That an appeal, *though accompanied by a supersedeas bond*, from an order vacating a receivership does not continue in office the receiver, or preserve the fund in his hands, as has been stated, was directly decided by this court in Hovey *vs.* McDonald, 109 U. S., pp. 160–162."

The fact is that Hovey *vs.* McDonald, by necessary implication, reaffirms the decision in Goddard *vs.* Ordway. In Hovey *vs.* McDonald the court was dealing with a rule of the supreme court of the District of Columbia relating to

appeals, and to the "principles and rules which relate to chancery proceedings exclusively." The rule in question provided for a supersedeas "only where the judgment is for a specific sum of money," and it did not provide that the appeal itself should operate as a supersedeas in any case or for any length of time. There was no supersedeas under the rule until the proper bond was filed. In that case the bill of complaint was dismissed in special term, and therefore, as this court held, there was no decree for a specific sum of money and no execution could issue in the case, except for costs. For this reason, and because the receiver paid over the fund before the supersedeas bond was filed, this court held that the rule had no application whatever to the case. The opinion then considers the effect of an appeal in chancery proceedings where there is no statute or rule relating to a supersedeas, and merely holds that under such circumstances it is entirely within the discretion of the court whether the fund or property shall be held pending the appeal. On page 159 Mr. Justice Bradley, delivering the opinion, says:

"To remedy the inconveniences that arose from an immediate issue of execution before the appellate proceedings could be perfected, the original judiciary act of 1789 provided, and the present revised statutes now provide, that no execution shall issue upon judgments in the courts of the United States, where a writ of error may be a supersedeas, until the expiration of ten days after the judgment (R. S., 1007). *This regulation applies to proceedings in equity as well as to cases at law;* but it does not extend to the present case."

The effect of the appeal taken by Mrs. Hitz from the decree of the general term of December 11, 1883, was governed by the statute referred to by Mr. Justice Bradley as amended by the act of February 18, 1875, enlarging the time within which the appeal itself operates as a supersedeas from ten days to sixty days (18 Stat., 318). The supersedeas

bond in question here was filed twenty days after the decree (120, 123).

The whole course of the opinion in Hovey *vs.* McDonald necessarily implies that if the decree of the special term dismissing the bill and directing the receiver to pay the fund in his hands to the defendants had been superseded when the fund was paid over, the receiver would have been liable.

While the approval of the bond given in this case as a supersedeas bond of itself entitles Mrs. Hitz now to all the benefits of a supersedeas without reference to the intention of the court in giving such approval, it should be noted that there was nothing in the decree of December 11, 1883, so far as Mrs. Hitz' interests were concerned, which could be stayed except the sale. If that could go on, a bond for costs would have been all that she required.

Laches.

As during the oral argument inquiries were made from the bench as to the several litigations in which Mrs. Hitz was involved prior to the bringing of this suit, we give here a memorandum in regard to them:

Hitz *vs.* National Metropolitan Bank, 111 U. S., 722.—This case involved the validity of a conveyance (as against creditors) which John Hitz had made to trustees, for the benefit of his wife and children, of his life interest as tenant by the curtesy in certain real estate. It was argued here March 14, 1884, just ten days before the sale of the real estate involved in the present case, and was decided on May 5, 1884. The validity of the deed was sustained.

The case of Keyser *vs.* Hitz, 133 U. S., 139, involved the statutory liability of Mrs. Hitz on two hundred shares of the stock of German-American National Bank which stood in her name. It was argued here October 25, 1889, 12 days before the filing of the bill in the present case, and was de-

cided January 6, 1890. The special term and the general term of the supreme court of the District had decided the case in Mrs. Hitz's favor, but the decision was adverse to her in this court. We are informed that the case was subsequently compromised.

The case of Hitz *vs.* Jenks, 123 U. S., 297, out of which the present case arises, was argued in this court in October, 1887, and was decided on the 14th day of November, 1887.

In the last five pages of their brief counsel for the appellees cite a number of cases, all but one of them in this court, in support of the proposition that a court of equity under certain circumstances will refuse to entertain a suit within a period less than that in which a concurrent action at law will be barred by the statute of limitations. We do not controvert this doctrine, but hold it has no application here. On pages 39 to 45 of our brief we cite a number of cases in this connection, including the leading case in this court of Hughes *vs.* Edwards, 9 Wheat., 489–497, in which it was held that in suits by a mortgagee to foreclose a mortgage, as well as in suits by the mortgagor to redeem, equity applies the statute of limitations relating to actions of ejectment. Most of the cases cited by counsel for the appellees on this point are cases in which the proceeding which the complainant sought to have set aside was one which was only voidable and not void. In this case the sale which the bill seeks to set aside was absolutely void. If there had been no deed of trust upon the property, Mrs. Hitz could have brought her action of ejectment at any time within twenty years without reference to "booms" on F street or any other supposed change in the situation. She was compelled to proceed in a court of chancery simply because she had only an equity of redemption in the property.

So far as the cases relied upon by the appellees bear upon

such a situation, they are in our favor. Thus in Godden *vs.* Kimmell, 99 U. S., 201, it is said :

"In many other cases they (courts of equity) act upon the analogy of the statutory limitations at law, as where a legal title would in ejectment be barred by twenty years' adverse possession, courts of equity will act upon the like limitation and apply it to all cases of relief sought upon equitable titles or claims touching real estate."

And in Galliher *vs.* Caldwell, 145 U. S., 368, it was held that the complainant after fourteen years, delay could not "be permitted to disturb *a title legally perfect* created by the general government."

In the present case the appellant's principal claim is that there was never any legal title in Jenks.

It should be remembered in this connection that if the court had not been in possession of the property by its receiver when the sale was made, Mrs. Hitz might have obtained possession from Keyser. In that case if the sale had been made she could have put Jenks to his action of ejectment. A court of equity by its own possession kept her out of possession while an attempt was made to divest her title, and that court should not now put her in a worse position than she would have been if the court had taken its hands off the property and allowed her an equal opportunity with her creditor to obtain the advantage which the law gives to the party in possession of real estate when the title is controverted.

And while dealing with this subject of laches we beg to remind the court that while we have endeavored to render it unnecessary for it to go into the questions of fact which were involved in the argument in the case as presented to the court below by resting our case here upon a question of law apparent on the face of the record, we do not at all agree with counsel for the appellees as to the facts which they have sought to bring before the court in their brief,

although advised by our brief that it was unnecessary to trouble this court to consider them. We do not agree, for instance, that the rise in the value of this property occurred just before the bill was filed. An examination of the evidence on this subject, we think, will show that the rise in values on Ninth street, in the neighborhood of the Patent Office, had begun before the sale of this property to Jenks by Tyler. (See complainant's witnesses Burford, 77, 78; Saunders, 240; Emery, 250; defendants' witnesses, Prescott, 168, 169; Duncanson, 181, 187; Edson, 213; Holtzman, 233.)

On the whole, we submit that there is nothing in the brief to which this is a reply which should prevent the court from complying with the prayer of the bill (12) that the sale be set aside and Mrs. Hitz "allowed to redeem said property by paying to the heirs of said Jenks what may be found to be due on an account stated in reference to said property."

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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 99.

JANE C. HITZ, APPELLANT,

vs.

JOHN STORY JENKS ET AL., APPELLEES.

BRIEF FOR APPELLEES.

STATEMENT OF FACTS

This case is a sequel to the case of Hitz *vs.* Jenks, 123 U. S., 297. As the single point relied upon by the appellant in this court may turn largely upon a question as to the proceedings in the former suit, a summary of them may be useful.

On June 16, 1877, the appellant and her husband conveyed the property in controversy, her separate estate, located at the northeast corner of 9th and G streets N. W., in the city of Washington, and containing about 8,200 square feet, to one Sarah L. Crane, who, on the following day, conveyed the property to Richard W. Tyler, trustee, to secure the repayment of $20,000, money borrowed from William P. Jenks, the ancestor of the appellees, with interest at 8 per

cent. per annum, the then current rate, payable semi-annually. Subsequently the German-American Savings Bank, of which appellant's husband was president, and to which he was largely indebted, failed, and one Benjamin U. Keyser, appointed receiver by the Comptroller of the Currency, and who, in that capacity, had obtained a deed of the property from Sarah L. Crane, filed a bill in equity to establish an alleged lien in favor of the bank, in priority to the mortgage securing Mr. Jenks. To this appeal, besides other parties not concerned in the present litigation, the appellant, Tyler, and Jenks were parties, and among the prayers for relief was one for an injunction against sale of the mortgaged property by Jenks and Tyler under a then outstanding advertisement of sale by them for default in the payment of interest; and on February 21, 1879, the special term granted the injunction prayed "until final hearing of this cause."

On October 21, 1879, appellant filed a cross-bill, alleging that both the lien claimed by the bank and the Jenks encumbrance were the result of a fraudulent conspiracy practiced upon her, imputing, however, neither notice nor want of good faith to Jenks, but praying that her said property might be freed from both encumbrances. The answer of Jenks and Tyler alleged that Jenks was a *bona fide* purchaser for value and without knowledge, notice, or suspicion of the equities set up in the original or the cross bill.

The cause coming on for hearing, the special term on November 28, 1881 (Record, pp. 116, 117), decreed the appellant to be the owner of the property, subject only to an estate by the curtesy in her husband, against which estate only the Jenks encumbrance could be enforced, dissolving the injunction *pendente lite* of February 21, 1879, "so far as it relates to the said interest of John Hitz," and ordering Keyser to account to the court for all rents received by him since the property came into his possession, and to surrender the possession to Richard W. Tyler, whom the decree ap-

pointed receiver to take possession of, rent, and manage the property and apply the rents to the payment of taxes, insurance, and other expenses needed to keep the property in tenantable condition until further order of the court, upon giving bond as such receiver.

Keyser, Jenks, and the appellant, however, uniting in an appeal to the general term from this decree, the court (Record, p. 118) ordered that upon the giving of a bond by Keyser, conditioned for the payment into the registry of the court of the rents and profits of the real property in controversy, the execution of so much of the decree as transferred the property to the receiver therein named should be stayed until final decision, the justice signing this order approving the bond therein referred to, which recited that so much of the decree of November 28, 1881, as related to the collection of the rents and profits of the real property was superseded by the order of December 15, 1881.

The cause came on to be heard in the general term, whose decree of December 11, 1883, will be found at pages 120–122 of the record. As will be seen upon an examination of it, it finds that no equity has been shown "to prevent or delay the execution (or) enforcement" of the deed of trust securing Mr. Jenks, dissolved the injunction *pendente lite* enjoining sale thereunder, reversed the decree of the special term retaining that injunction in respect to the interest and estate claimed by the appellant, required Keyser to account for all rents received by him, both before and subsequently to the decree of the special term, retained the cause for the purpose of allowing the parties to determine the opposing claims of Jenks, Hitz, and Keyser to the rents and profits collected by the latter, and appointed Tyler receiver "until a sale could be made under the said deed of trust, to take possession of the property, collect the rents and profits, and apply them to taxes, insurance and other proper expenses," etc., in terms, however, declaring the decree to be without prejudice to the rights of any party entitled to the reversion of the property

"to redeem or to make claim as such party may be advised, to any balance or portion thereof which, upon a sale under the said deed of trust and the satisfaction of the debt secured thereby, with interest and costs, and of the expenses of the sale, may remain in the hands of the trustees." The eighth paragraph of the decree dismisses the original and supplemental bills, the cross-bill of the appellant and the amendment thereto, except in so far as retained, as above set forth.

From this decree the appellant appealed to this court, giving an appeal bond in the penalty of $3,000, which was about equal to the rents for one year of the property in controversy.

The decree in question was accompanied by an opinion of the court, reported in 2 Mackey, 513, which declared that Tyler, the trustee under the Jenks encumbrance, "should be allowed to proceed to execute his trust. It may be that, after payment of the note to Jenks by sale of the premises, a surplus may remain to be disposed of. It is proper that the trustee be required, in case he makes sale and receives such surplus, to pay the latter into court." At a hearing of the same cause by the same court in July, 1888, it declared that the trustee, Tyler, under the above decree "was authorized by the court to sell the property at private (misprint for public) sale under the deed of trust."

Not only does the court which passed the decree thus declare its purpose and effect, but all the parties at that time appear so to have understood it. The property was advertised for sale by the trustee under the deed of trust in March, 1884, of which the appellant had due notice, and she, by her solicitor, on the 10th day of that month, wrote to the trustee, questioning his right to sell, not upon the grounds that the property was in the possession of the court by its receiver, or that the injunction granted by the special term was still in force, or the retention of the cause by the court for the purposes specified in its decree, or the uncertainty of

the result of the litigation in this court, but solely on the ground that a supersedeas bond had been presented, approved, and filed in the cause (Record, p. 9). At the sale Mr. Jenks became the purchaser for the price of $29,200, which was at the rate of about $3.65 per square foot, and was insufficient by $4,745.73, exclusive of the arrears of taxes, to pay the amount of the incumbrance, appellant having failed to pay taxes, interest, or insurance charges for nearly seven years, and the aggregate of their arrearage then being upwards of $13,300.

Eight months after the sale the appellant, through her solicitor, obtained an order from the court referring the cause to the auditor to report the proper distribution of the rents which had been paid into the registry of the court by Mr. Keyser as the condition of the non-appointment of a receiver by the court at the time of the decree of the special term above mentioned. This order required an accounting by Keyser before the auditor as to all rents which were or might have been collected by him, "as well before the order of December 15, 1881, passed by the special term in this cause, as after said order, *and until the possession of said premises passed out of his hands*," no objection being made to the fact that they had passed out, or that they had been sold. The other claimants objected to the allowance of the usual receiver's commissions to Keyser on the ground that he was a receiver not appointed by the court, but under designation by the Government, and in receipt of an annual compensation for the duties of his said position (Record, p. 126). The auditor allowed the commissions on the ground that collection of rents of real estate did not appear to be included within the ordinary duties of a bank receiver. The main question contested before the auditor, however, was whether the rents in question should be applied to payment of the tax arrearages, and thus lessen the deficiency in the payment of the Jenks encumbrance, or should be paid to the appellant, under the theory that the mortgagor was entitled to the

rents until foreclosure. The auditor inclined to the latter view, except as to the taxes accruing after the decree of the special term and during the time that the rents were being paid into the registry of the court (Record, pp. 128–'9); but, upon exceptions, the general term directed application of the rents to the entire tax arrearage (Keyser *vs.* Hitz, 4 Mackey, 179), from which action the appellant appealed unsuccessfully to this court (Hitz *vs.* Jenks, 123 U. S., 297). The fact of the sale of March 26, 1884, was brought to the attention of both the general term and of this court, and, as above pointed out, the former court, in 4 Mackey, at page 181, declared that Tyler, the trustee, was authorized by that court to sell the property at public sale under the deed of trust, as he had done, and this court, after declaring that the decree of the general term of September 11, 1883, had dismissed both the original and the cross bills in the cause, "save that the cause was retained to take an account of the rents and profits received or which should have been received by Keyser, and to determine the right to those rents and profits, which were claimed by Mrs. Hitz as her separate property, by Jenks as part of the security afforded by the deed of trust to Tyler, and by Keyser under judgments recovered against Hitz" (123 U. S., p. 299), adds:

"When it was afterwards adjudged that * * * the sum obtained for the land at a sale under a power contained in this deed proved insufficient, by more than the whole of the fund in court, to pay the debt of Hitz to Jenks, secured by this deed, it was rightly held that Mrs. Hitz had no right as against Jenks to any part of this fund" (*id.*, pp. 306, 307).

The decision of this court, conclusively terminating the possibility of further question touching any of the issues raised in the case of Keyser against Hitz, was rendered November 14, 1887. Up to that time, if we except the dubiously stated objection by appellant, through her counsel, of March 10, 1884, based solely upon the fact that she

had filed a supersedeas bond (Record, p. 9), there had been no intimation of any question by the appellant as to the entire validity of the sale, nor of any dissatisfaction upon her part with it. Not only so, but the reference obtained by her to the auditor, the contest by her before that officer, before the general term, and before this court, was whether the rents in the registry of the court should be applied to the deficiency of the Jenks indebtedness remaining *after the sale* of the property, or should be paid to her under the rule affirmed in Teel *vs.* Walker, 111 U. S., 242, that a mortgagee is not entitled to the rents and profits until lawfully put into possession of the land.

Not only so, but three years more were permitted by her to elapse, when, in November, 1890, she filed the bill in this cause, alleging the sale to have been invalid upon a variety of grounds, among which the principal were the alleged fact that the property at the time of the sale was in the possession of a receiver appointed by the court; that her appeal from the decree of the general term of December 11, 1883, and her supersedeas bond given in that connection suspended the right of sale; that the injunction *pendente lite* given by the special term was revived or continued in force by her appeal and supersedeas; that the price realized was grossly inadequate; that the terms of sale were all cash instead of partly cash and partly on time, and the like.

The necessity of explaining her delay in raising the objections was attempted to be met by setting forth that, in addition to the litigation in the controversy with Keyser over the property now in suit, she had been engaged in one other suit over her alleged statutory liability as a stockholder of the German-American Savings Bank; that the former of these suits had not been finally closed, a statement which, as explained in the testimony, amounted to no more than that the mandate of this court had not been promptly sent down to the lower court, and that some trivial question of costs had not been determined there, and that the em-

barrassed condition of her estate had obliged her to be very economical (Record, p. 11). The answer of the present appellees, William P. Jenks, their testator, having died in 1886, denies that the reasons thus alleged for delay "are either true in fact or sufficient in law," avers that the complainant is possessed of large wealth, and that "the causes set forth by her have not induced the said delay as claimed." Upon the issue thus presented upon the question of laches the complainant made no effort to sustain the allegations of her bill by any proof beyond the fact that she was "very seriously annoyed" by the litigation (Record, p. 75); that the mandate of this court, after the final and complete disposition of all the questions in the case by the opinion rendered in 123 U. S., at p. 297, on November 14, 1887, had not been filed in the court below until February 11, 1889 (Record, pp. 155, '6), and that on June 16, 1890, a taxation of costs in the cases was ordered.

POINTS AND AUTHORITIES.

I.

Upon the question, very earnestly insisted upon below, whether the injunction *pendente lite* granted by the court below in special term was revived or continued in force by the appeal from the decree of the general term of December 11, 1883, it was urged, although this court had repeatedly declared that an appeal from a decree granting, refusing, or dissolving an injunction does not disturb its operative effect (Slaughter-house cases, 10 Wall., 297; Hovey *vs.* McDonald, 109 U. S., pp. 161, 162; Leonard *vs.* Ozark Land Co., 115 U. S., 465; Knox Co. *vs.* Harshman, 132 U. S., 14), yet that the application of this rule by this court had been confined to appeals from orders granting injunctions, or refusing them, and that the case of an appeal from an order dissolving an injunction had never been passed upon by it, the po-

sition of the appellant apparently being that the decisions in these cases were only applicable to the particular or practical point presented by the appeals in them; or, in other words, that the *principle* recognized and adopted as the basis of the decision was *obiter*, and only the application of that principle in the particular case is binding as authority. This point, however, we are advised by the appellant's counsel, will not be presented here, and therefore need not be further discussed.

II.

The proposition that a mortgagee whose encumbrance was for so many years in default that the arrears of interest, taxes, and insurance charges aggregated nearly 70 per cent. of the principal of the indebtedness might be postponed in the matter of enforcing his mortgage, and that an injunction *pendente lite* which the court below had dissolved and refused could thus be in effect revived against him by the act of the mortgagor in taking an unfounded appeal, and thus creating the uncertainty of litigation set forth in the bill as a reason why the foreclosure sale was invalid, is, it is believed, equally untenable. Precisely the same point was presented, among others, in the case of Wheeler *vs.* McBlair *et al.*, in which case, there being litigation to enjoin foreclosure, of which express notice was given on behalf of the appellant at the time of the sale, the court below said:

"The only conduct at the sale likely to prevent full competition among bidders was that of complainant's husband and agent, who gave written notice of the invalidity of the sale and of the pending litigation. If this protest, which is probable, caused the property to bring less than it might otherwise have done, the complainant has herself to blame for it" (5 D. C. App., 375, 383).

The decree was affirmed in this court in 172 U. S., 643, without an accompanying opinion, the correctness of the

rulings below being evidently regarded as too plain to require discussion.

This proposition also, we are advised, will not be discussed here by or on behalf of the appellant, and may therefore be submitted without further references.

III.

The allegation that the price realized at the sale was inadequate not only failed of proof in the testimony, but was conclusively disproved. The witnesses in support of this claim, five in number, were, as the Court of Appeals in its opinion declares, men of very limited experience in real estate, no one of them being able to corroborate his estimate by instancing any sale or sales whatsoever in the neighborhood and at all contemporaneous with the sale in question, while, on the other hand, sixteen witnesses, including the most prominent real-estate agents in the city, testify that the price realized was a full and fair price for the property at the time it was made, and substantiate their opinions by citing numerous sales in the vicinity before, contemporaneous with, and shortly subsequent to the sale in question, showing that many properties of equal and of greater desirability in the immediate vicinity were sold both before and after at prices even more favorable to the purchaser. Three persons of ample means and without any concert among themselves were present for the purpose of purchasing the property, all of them desisting because it went beyond what they considered a proper or desirable price. As the Court of Appeals declares in its opinion, the preponderance of testimony upon this point is simply overwhelming in favor of the appellees; and this point also, we are advised by counsel for the appellant, will not be pressed here.

IV.

The claim that it was unreasonable and improper to offer the property for sale upon terms of payment in cash of the entire purchase-money would seem to be sufficiently answered under the preceding head. If the price for which the sale was made was the full and liberal market price of the property at the time, the terms proposed, if not justified by the result, at least form no ground of valid objection. The mortgagee had for years been kept out of both his principal and his interest until the arrearage of the latter alone aggregated nearly $9,000, and if to this aggregate of principal and interest there had been added the arrears of taxes and insurance charges, and if the property had been sold upon terms of one-third cash and the balance in one and two years, as was insisted should have been done, the mortgagee, after the sale, would have had a larger incumbrance for the deferred purchase-money and a smaller margin of security than the testimony shows he was willing to accept originally.

This point, however, like the preceding ones, it is stated, will not be argued here.

V.

The only objection to the decree below dismissing the appellant's bill, which is presented by the assignment of errors and which, we are informed, will be the only one urged here, is that the foreclosure sale of the property in controversy was invalid upon the ground that the property then was, according to the appellant's claim, in the custody of a receiver appointed by the supreme court of the District of Columbia. This objection is presented in several different aspects, namely: (1) That the sale was absolutely void, because at the time it was made the property was in possession of the supreme court through its receiver; (2) that

the court did not direct or authorize sale of the property while in the possession of its receiver, and (3) that if it did attempt to authorize sale of the property while in the receiver's hands such attempt was superseded by the appeal and supersedeas bond.

1.

The objection, in its first and principal form, presents both a question of fact and a question of law, namely: First, is it true that the property in controversy was in the possession of the court through its receiver at the time of the sale? and, secondly, if so, did that fact render the sale either void or voidable under the surrounding circumstances and subsequent history of the case?

In the first place, it is respectfully submitted that appellant is in error in her claim that the property was at any time in the possession of the court or of its receiver, at least under the theory urged by her as to the effect of her appeal and supersedeas bond.

It is true that when the case of Hitz *vs.* Jenks was before this court the appellee, Keyser, was treated as though he was in possession of the rents then in controversy, in the capacity of a receiver appointed by the court. This was true enough, in legal effect, in so far as the question then before the court was concerned. The court had practically impounded the rents and required them to be paid into its registry. They were not really in Keyser's hands at all, but in the registry of the court, placed there under its compulsory requirement as the only condition under which Keyser, who claimed to be the owner of the property, would be allowed to retain possession of it, and but for whose acceptance of which condition the rents would have been in the hands of a receiver; and, as stated, it was competent enough for the purposes of the suit as then before the court to treat them as in a receiver's hands. Here, how-

ever, the question is differently presented; not merely the rents, but the property itself, it is now contended, was in the hands of a receiver, and the question is raised, not, as then, for the purpose of determining how they should equitably be applied, but whether a defeated mortgagor, who for many years had involved the mortgagee in groundless litigation and delayed him in the collection of his debt, to his great loss and injury, may through the instrumentality of such a claim technically defeat a foreclosure sale, made nearly seventeen years go, for the full and fair value of the property at the time, and thereby to secure to herself the benefit of a subsequent and then unanticipated rise in price which has quintupled the then value of the property. Under these circumstances, it is submitted, it is not only competent, but right, to inquire whether the property in question was, in fact, in the hands of a receiver at all at the time of the sale, as alleged.

As appears from the foregoing summary of the facts and from the record, Keyser came into the possession of this property through a conveyance by Sarah L. Crane to him as receiver of the German-American Savings Bank, appointed by the Comptroller of the Currency, the bank being a very large creditor of Mr. Hitz, its former president. It was in this capacity as the grantee and owner of the property that he, Keyser, obtained possession; and he retained it in this capacity down to the decree of the special term of November 28, 1881. This decree, as originally passed, required him to surrender possession to Richard W. Tyler, thereby appointed receiver; but by December 15, 1881, a modifying order was passed, not appointing Keyser receiver, but permitting him to remain in possession as he had been before, on terms of filing a bond, as receiver of the German-American Savings Bank, in the penalty of $5,000, and of depositing the thereafter-accruing rents collected by him into the registry of the court. He had at this time appealed from the decree of November 28, and was therefore still insisting

upon his right to the rents as owner; but, to avoid transfer of possession to a receiver, he agreed to deposit the rents in the registry of the court, and to file his bond as receiver of the bank, in which capacity he claimed the property, conditioned for his faithful compliance with the order.

After this order of December 15, 1881, the position of Keyser continued to be that of one in possession of land, claiming to be its owner, but consenting to turn over its rents as collected by him into the registry of the court, subject to the result of his appeal from the decree of the special term denying his ownership; and this remained his attitude and position until the decree of the general term of December 11, 1883. Indeed, this view is conceded by the bill in this cause, which alleges, in paragraph 7 (Record, pp. 4, 5), that "Keyser took possession of the property as receiver of the bank, and that the decree of the special term appointing Tyler receiver was modified by special order permitting Keyser to continue in possession on terms of depositing his collections into the registry of the court monthly."

Indeed, the assignment of errors in this cause is based upon the claim, not that Keyser was a receiver of the court or that the court was in possession of the property at any time through him, but that the property was in the custody *of Tyler*, "as a receiver appointed by the supreme court of the District of Columbia in general term by the decree of December 11, 1883," which is the identical decree from which the appellant appealed to this court, and which decree, she claims, was superseded and rendered nugatory pending the appeal by virtue of her supersedeas bond, and this is the position taken by her in this cause, her bill, in the eighth paragraph (Record, p. 7), averring in terms that her appealed bond rendered it unlawful for Keyser to deliver possession to any one.

Of course, if appellant's contention under this claim of her bill and under her third assignment of error, discussed at pages 25–30 of her brief, that her appeal and supersedeas

bond rendered the decree of December 11, 1883, nugatory, it must follow inevitably that Tyler's appointment as receiver was superseded or suspended by that appeal and never took effect at all.

But, on the other hand, if the appellant may insist that her claims in this regard are untenable, and that the decree of December 11, 1883, was operative and effective, notwithstanding her appeal and supersedeas bond, is it true that by that decree the supreme court of the District of Columbia took the property into its possession, through its receiver, in such manner as to interfere with or prevent a sale under the deed of trust? This result is urged upon the authority of certain cases to the general effect that property may not be sold while in the hands of the court or of its receiver and of certain general statements in the text books that a formal order is necessary to the discharge of a receiver.

Of course, these principles and authorities are in point only in cases where the property is taken by the court into its possession or into that of its receiver, under such circumstances as indicate its purpose to preserve it from sale or other disposition while so in its possession and pending decision by it of the questions involved in the suit. The rule is simply and purely an ancillary one, for the purpose of preserving the property until the court has determined to whom it belongs, so that it may then award or distribute it accordingly and protect those in whose favor it decides the rights which it adjudicates them entitled to enjoy. The present seems to be the first attempt to extend the rule beyond these purposes and to make it the basis of an entirely independent suit by one who was adjudicated not entitled to any of the rights asserted by her in the suit in which it is claimed the receiver was appointed.

In the first place, then, was the property in controversy taken into the possession of the court at all, or placed in that of its receiver with the intent or for the purpose of preserving it from sale, or preserving it for distribution by the court

among the parties thereafter to be adjudged by it entitled to the same?

For answer to this inquiry, we have the right to look to four sources of enlightenment, namely, to the decree itself, to the opinion of the court accompanying it, to the contemporaneous understanding of all the parties in interest as manifested by their conduct, and to the subsequent construction and action of the court which passed it.

With respect to the decree itself (Record, pp. 120–122), as before pointed out, it declares that there is "no equity shown in this cause to prevent or delay the execution or enforcement of the deed of trust." It appoints Tyler receiver only "until a sale shall be made under the said deed of trust." It declares that the parties in interest shall be left at liberty "to redeem or to make claim, as such party may be advised, to any balance or portion thereof" which might remain in the hands of the trustee after the sale and satisfaction of the debt secured, with interest, costs, and the expenses of the sale, and it thereupon dismisses both the original and the cross-bills entirely, except for the purpose of allowing the several claimants to the rents and profits in the registry of the court, and to any surplus remaining after the sale, to litigate their claims.

With respect to the opinion accompanying the decree, which is a proper source of reference to ascertain its intent and meaning (Baker *vs.* Cummings, 181 U. S., 117), we find that the court, in passing the decree, declared, specifically, "that the deed of Mrs. Hitz and her husband to Crane and the deed of Crane in trust to Tyler to secure Jenks are valid, *and that the trustee in the latter should be allowed to proceed to execute his trust*" (Keyser *vs.* Hitz, 2 Mackey, 526).

With respect to the contemporaneous understanding of the parties, all of whom were represented by able counsel, we find that Tyler and Jenks understood that the court had given them leave to proceed, as is evidenced by their advertisement and sale; that Mr. Keyser and his coun-

sel also were of this opinion, as is evidenced by their acquiescence and inaction, and that the present appellant and her counsel were of that opinion, as evidenced by their like acquiescence and inaction and by their letter to Tyler of March 10, 1884, suggesting as the only objection or obstacle to the sale the fact that she had given a supersedeas bond (Record, p. 9). And that this was the understanding at the time of all the parties is further evidenced by the fact that, the sale having resulted in a deficiency, all of them—Keyser, the appellant, and Mr. Jenks—litigated the question before the auditor and before the general term whether the rents and profits in the registry of the court should be applied to this deficiency or be allowed to go to the other claimants, this question being further pursued, so far as the appellant was concerned, to this court, where her contention was that, under the doctrine of Teel *vs.* Walker, Jenks, the mortgagee, was not entitled to the rents and profits accruing before he had been lawfully put into possession of the land.

With respect to further manifestation by the court of the intention and purpose of its decree, it declares in terms, in Keyser *vs.* Hitz, 4 Mackey, page 181, that Mr. Jenks had been "authorized by the court to sell the property at public sale under the deed of trust," two of the same justices sitting at this time as when the opinion was rendered in 2 Mackey, 473, including the justice who delivered the opinion.

In the light of these facts and circumstances, we submit, it is perfectly plain that the decree of December 11, 1883, appointed Tyler receiver only "until a sale shall be made under the said deed of trust;" that this, its decree, was made contemporaneously with and in pursuance of its opinion that he "should be allowed to proceed to execute his trust;" that the court in and by its said action intended, as it declares in 4 Mackey was its purpose, to authorize the trustee to proceed to sell under the deed of trust, and that all the parties in interest so understood the matter at

the time and acquiesced in that construction of the decree. Had the appellant then conceived that the injunction was in force, or that the property was in the possession of the court's receiver in any sense which rendered a sale improper, or that her supersedeas bond really superseded the trustee's right to sell, it was her right and her duty, by a petition or other proceeding in the cause, to bring the matter to the attention of the court at the time for its action, and not to stand by in apparent acquiescence until the sale had been made and for seven years afterwards, when the property had quintupled in value, before raising the objection.

In Virginia Iron Co. *vs.* Bristol Manufacturing Co., 88 Fed. Rep., 137, cited by the appellant, the court declares that where an injunction, attachment, or rule to show cause becomes necessary to the protection of the receiver's possession, such a proceeding in the cause as will call the attention of the court to the fact that its jurisdiction is being invaded is the necessary and proper course.

To apply another test:

All the authorities denying the validity of a sale made when the property sold is in the possession of the court's receiver declare it to be a contempt of court, and that the offending party is punishable for the contempt. If, therefore, Tyler's sale falls under the principle of these authorities, his conduct also falls under it, and he was guilty of a contempt. Could he by any possibility have been adjudged in contempt by the court which appointed him receiver only until he should make sale of the property under the trust, which declared by the very decree so appointing him that he should not be delayed as trustee in the enforcement of the deed of trust, which declared in its accompanying opinion that he should be allowed to proceed to foreclosure under it, and which declared in its opinion, when the case next came before it, in 4 Mackey, that it itself had authorized him to proceed to sell at public sale under that instrument?

We respectfully submit, then, in the first place, that it was

neither the intention nor the effect of the decree of December 11, 1883, to place a receiver in charge of the property in such manner as to interfere with or prevent its sale under the deed of trust, and that therefore the sole ground upon which the appellant is driven to rest her case in this court is wholly untenable.

But, in the second place, it is further submitted that the rule invoked by the appellant, even in cases to which it applies, has no application in a collateral, wholly independent suit, in which it is neither needed nor appropriate for the protection or enforcement of the rights of any party ascertained or adjudicated in the case in which the receiver was appointed. The rule in question rests for its foundation and depends for its existence upon the reason that it is necessary to the jurisdiction of the court in the case in which the appointment is made, and to enable it to preserve the property so taken into its possession for the purpose of administering it according to the rights of the parties as they may be adjudicated in that cause. It has never been held in any case that a stranger to the litigation or a defeated litigant claiming no rights under its results can invoke the rule in a collateral, independent suit, brought neither to enforce nor attack any right adjudged by or derived from the former proceeding.

No one of the authorities cited on behalf of the appellant sustains or gives any countenance to the application of the rule to such a case as hers.

In Wiswall *vs.* Sampson, 14 How., 52, the court declared the property to be "a fund in court, to abide the event of the litigation"—*i. e., that* litigation; and that, in order to enable the court to effect its duty of seeing that the fund is applied in conformity with the rights of the parties, it must administer the fund "independently of any rights acquired by third persons, *pending the litigation. Otherwise, the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless.*" And at the same page (66) the court

places the matter virtually upon the basis of *lis pendens*, binding the title from the filing of the bill, "and any purchaser, *pendente lite*, even for a valuable consideration, comes in at his peril." But the pendency of some *former* suit can never be availed of by the complainant in a later, independent, and wholly different proceeding.

In this case of Wiswall *vs.* Sampson, the proceeding was ejectment, and, therefore, in a technical sense, collateral. But the circumstances were that, Wiswall having filed his bill claiming priority for his judgment, the court having taken possession by its receiver, and the chancery suit ending in a decree in Wiswall's favor, effectuated by sale of the property in that suit to him, it was attempted to defeat the effect of that decree by setting up in ejectment a marshal's sale under a judgment at law to one Dargan, pending the receivership, the effect of which execution sale, if allowed, would have been to take away the jurisdiction of the chancery court for all practical purposes, and to cause the whole property or fund to pass "out of its hands before the final decree, and the litigation to become fruitless."

The doctrine of this case is declared by this court in Heidritter *vs.* St. Elizabeth Oil Cloth Co., 112 U. S., at p. 304, to be that the jurisdiction of one court over property in its possession cannot be violated by proceedings in another court prosecuted to judgment and sale without the permission or sanction of the former tribunal, and to this effect only, in principle, are all the other cases cited by appellant upon this latter case, namely, Peale *vs.* Phipps, 14 How., 374, 375; Hagan *vs.* Lucas, 10 Pet., 400; Williams *vs.* Benedict, 8 How., 107; Pulliam *vs.* Osborne, 17 How., 471; Taylor *vs.* Carryl, 20 How., 583; Yonley *vs.* Lavender, 21 Wall., 276; People's Bank *vs.* Calhoun, 102 U. S., 256; Barton *vs.* Barbour, 104 U. S., 126; Covell *vs.* Heyman, 111 U. S., 176; and to this effect only are also the following other citations in appellant's brief, namely, Walling *vs.* Miller, 108 N. Y., 172, 177; Russell *vs.* Railway Co., 68 Tex.,

652; Gay *vs.* Brierfield, 94 Ala., 310; Dugger *vs.* Collins, 69 Ala. 330.

McLaughlin *vs.* Janney, 6 Gratt., 609, is to the effect that officers proceeding to execute a decree after an appeal therefrom duly taken are guilty of a contempt of the appellate court, and that their acts are null and void "as to the rights of the parties to the appeal."

In Day *vs.* Postal Telegraph Co., 66 Md., 354, also, the question arises in the same, not in a collateral suit, and the court, at pages 368, 369, places its decision upon the ground that the court must "keep a strict hand over the property in the hands of a receiver * * * in order to preserve entire jurisdiction over the whole matter and to do that which is just *in the cause* between the parties.

With respect to the alleged necessity of a formal order to discharge to receiver, the rule is thus laid down in Beach on Receivers, at section 796:

"The functions of a receiver terminate with a judgment adverse to the party who procured his appointment although his *character* as receiver may continue for the purpose of rendering his account and until he is by order discharged from his trust. * * * The dismissal of the action does not discharge the receiver from accountability to the court which appointed him."

Upon these principles and authorities we further submit, therefore, that the rule making invalid any sale of property in the hands of a receiver of the court, and without its leave, is for the purpose of preserving its jurisdiction and of making effective its adjudications *in that* suit, and that it has no application to a new and independent suit, seeking neither to enforce nor in any manner to affect any right adjudicated or established in the former suit.

2.

If we are correct in either of the foregoing propositions namely, that the receivership created by the decree of December 11, 1883, was a receivership to continue only until sale by the trustee, the latter being left free to make such sale whenever he chose to do so; and that, independently of this view, the rule rendering invalid sales of property in the possession of a receiver without leave of the court which appointed him is an invalidity applicable only to that suit in the protection of rights adjudicated or established therein, then it is, pehaps, superfluous to consider any other of the questions in the case; and, indeed, the proposition discussed in appellant's brief, under the second assignment of error, denying that the decree of December 11, 1883, authorized or permitted Tylor to make the sale, has been already considered in connection with the preceding assignment of error.

The concluding point stated under the appellant's second proposition, at page 24 of her brief, to the effect that "as long as the property was in the hands of the receiver Mrs. Hitz could neither sell nor mortgage it for the purpose of raising money to pay the debt due Jenks," while not perhaps material to the legal questions here involved, is singular. The fact that the property was placed in the hands of a receiver to collect the rents until a sale was made no more interfered with a new mortgage or a sale of her interest by Mrs. Hitz than a decree in a foreclosure suit appointing trustees to sell, ties the hands of the mortgagor, or prevents him from effecting a new mortgage, or from making a sale of the property for the purpose of providing in these ways for the mortgage debt at any time before the foreclosure sale. If Mrs. Hitz had found a purchaser at a price satisfactory to herself and sufficient to pay off the claim of Jenks, or if she had negotiated a new loan sufficient to pay off the Jenks mortgage, neither her then nor her present counsel would

have found any legal difficulties or obstacles to the accomplishment of these purposes to which they would not have been readily equal.

3.

The third assignment of error is based upon the claim that—

"If the decree of December 11, 1883, did authorize or permit Tyler, as trustee, to sell the property which he held as receiver, the superseding of that decree rendered such authorization or permission nugatory, and the sale made under it was absolutely void."

It is a little difficult to comprehend appellant's position in this regard from any standpoint.

As above pointed out, there never was any appointment of a receiver in this case prior to December 11, 1883. All that stood in the way of a foreclosure sale up to that date was the injunction *pendente lite*, the dissolution of which by the decree of December 11, 1883, it is no longer claimed was superseded by the appeal.

But if there had been such an appointment of a receiver prior to December 11, 1883, as to interfere with or prevent sale up to that time, and if the decree of December 11 abrogated that receivership in so far as respects interference by it with a foreclosure sale, it would not be true that the court was without power to pass such an order, or that its order to this effect would have been suspended or rendered nugatory by the appeal.

This precise point was before this court in Hovey *vs.* McDonald, 109 U. S., pp. 160–162. In that case a receiver had been appointed by the court to take possession of a fund and had reduced it into his possession. At the hearing the court there, as here, dismissed the bill, and it further directed the receiver to pay over the money to one of the claimants, from which decree an appeal was noted, and

within the prescribed time perfected by a supersedeas bond. The receiver, nevertheless, paid over the fund after the appeal had been noted and without awaiting the time allowed for the perfection of the appeal. This court, after expressing some doubt whether, under the laws of the District of Columbia, the supersedeas became effective until the bond had been actually given, nevertheless placed its decision upon the ground that the rules respecting supersedeas of execution have no application to such matters as were involved in that case, and that, in addition to superseding the order or decree, it was essential to obtain a special order of allowance for the continuance of the injunction, or the like, if the property or fund was to be retained or preserved by continuation of the receivership.

In the third place, as has been before pointed out, the proposition now being considered presents the incongruity of claiming that an appeal and supersedeas of the very decree appointing a receiver continued that receiver in existence, and simply deprived him of the power, in his capacity of trustee, which the decree of his appointment reserved to him.

The authorities cited in support of this proposition have been examined with a degree of care justified by the eminence of opposing counsel, but which, we must confess, seem to have no bearing on the case in hand.

Goddard *vs.* Ordway, 94 U. S., 672, is distinguishable in a variety of particulars.

In the first place, the one contention in that case was as to the disposition to be made of the fund in the possession of the receiver. An order to pay the money to the party whom the court below had decreed entitled to it would have executed the decree and disposed of the fund, leaving the appellate court without jurisdiction, and rendering any decree which it might thereafter make "fruitless." No analogy to these conditions is presented by the case at bar. The court below did continue the receiver for the purpose

of preserving all property in controversy which could be dissipated or escape the jurisdiction and distributive powers of the appellate tribunal, and simply removed its staying hand from the right of the trustee to execute his trust. A reversal by this court of the decree below would have found the realty intact and subject to its decree.

In the second place, it was not claimed in Goddard *v.* Ordway that the supersedeas should have the effect of continuing a receivership which had been vacated by the decree appealed from. The decree below, in fact, had not vacated it, but the court below was applied to, after appeal taken and supersedeas bond given, to go further and to execute its decree by enforcing payment of the fund to the litigant in whose favor it had decided. As this court say in the opinion:

"The only execution there could be of the decree below was the collection of the costs and the delivery to the defendant of the fund in court, which is the subject-matter of the litigation. To that end, *a further order* of the court was asked; but such an order would be in aid of the execution of the decree which has been stayed, *and consequently* beyond the power of the court to make until the appeal is disposed of."

In Goddard *vs.* Ordway, as is shown by the record of that case in this court, and as is referred to in the opinion, the appellant had pursued what Hovey *vs.* McDonald and the other authorities above cited declare to be the proper course by obtaining from the court a restraining order, in effect continuing the receivership and preserving the fund until the court's further order.

It is still further to be noted that in Goddard *vs.* Ordway the question arose in the cause, and was for the purpose of preserving the jurisdiction and giving effect to the ultimate decree of the court in that cause, not, as here, in an effort to preserve the title of the defeated litigant and enable her to

assert that title in a new litigation not begun until seven years afterwards, and because of the greatly enhanced value of the property.

Even if the trustee's sale had been made while the property was in the hands of a receiver, through misconstruction of the effect of the decree through inadvertence and without the court's leave, such fact was without any materiality in the cause, in view of the ultimate decision therein. In the final decision of Goddard *vs.* Ordway, 101 U. S., 745, 751, 752, the court recognizes the principle that a decree is not to be reversed " because of what was, undert he circumstances, an immaterial departure from technical rules (*Alis vs. Insurance Company*, 97 U. S., 144)."

If any further consideration were necessary in respect to Goddard *vs.* Ordway, the construction placed upon that decision by appellant, if correct, would render it directly antagonistic to the carefully considered opinion of this court directly upon the point, in Hovey *vs.* McDonald, 109 U. S., pp. 159–161, above referred to.

Draper *vs.* Davis, 102 U. S., 370, did not present any question as to receivers, but simply the question whether the lower court, after a supersedeas bond had been approved by one of its justices and filed, could require a further bond of the appellant and direct execution upon his failure to comply with such requirement. The only ruling by this court was that the power of the justice over the appeal was exhausted when he approved the bond and signed the citation.

The *Rio Grande*, 23 Wall., 458, was a libel in admiralty for repairs, in which class of proceedings "jurisdiction of the *res* is obtained by seizure under process of the court." An order for release of the vessel from seizure, improvidently made pending the perfecting of an appeal from the decree of the district court, was held not to defeat the jurisdiction of the appellate or circuit court, although executed; that an actual and continuous possession of the *res* is not re-

quired to sustain the jurisdiction; that an accidental or fraudulent or improper removal of the vessel from the custody of the marshal did not destroy the jurisdiction, and that the order for its restoration "was in direct violation of the statute regarding appeals, and did not operate to destroy the jurisdiction of the court." This question, namely, whether the jurisdiction of the appellate court had been destroyed by the release of the vessel under the circumstances, was the only point involved or decided in reference to the subject now under consideration. The question whether an appeal in equity from a decree vacating the appointment of a receiver, either wholly or to the extent of no longer preventing sale, superseded such vacation was in no manner involved or presented.

The case of Grant *vs.* Phœnix Insurance Co., 121 U. S., 108, also decides nothing which is pertinent here. But the same case, reported in the same volume, at pages 105, 117, decides that interlocutory or other orders in regard to receivers are not superseded by an appeal to this court, although, as the report of the same case at page 118 shows, that appeal was accompanied by a supersedeas bond.

Krippendorf *vs.* Hyde, 110 U. S., 276, is apparently without any analogy to the case at bar, however remote. The only expression in the opinion which can be considered as bearing upon it is the following: "The grounds of this procedure," *i. e.*, that of admitting a stranger to an attachment or other suit in which the court has acquired possession of property, to intervene *pro inter esse suo*, "are the duty of the court to prevent its process from being abused to the injury of third persons, and to protect its officers and its own custody of property in their possession, so as to defend and preserve its jurisdiction, for no one is allowed to question or disturb that possession except by leave of the court." But, in the present case, neither the courts below nor the appellees here have denied this power. Neither the jurisdiction of the court in the former case, nor the possession of its officers, nor the

rights of any one claiming under its decree, is either antagonized or questioned by the decree here appealed from or by the appellees.

In re Tyler, 149 U. S., 164, 181, is to similar effect, declaring it a contempt of court to interfere with its possession without its leave; nor is Pittsburg Railway *vs.* Loan and Trust Co., 172 U. S., 493, 513, nearer in point.

No authority is cited, and none can be, that a litigant in whose favor no right has been established by the decree or judgment in a former suit, or one all of whose contentions have been decided in such suit adversely to him, may invoke the rule under consideration in a wholly different litigation, initiated long subsequently and for a purpose such as is here contended for.

In Bronson *vs.* La Crosse R. R. Co., 1 Wall., 405, also it is only necessary to examine the facts of the case to observe its entire want of applicability here. The question there was whether the act of March 3, 1863, empowering United States district courts in the eighth circuit to issue final process or to use their powers and process to enforce their judgments and decrees in all cases in which they had rendered final judgment prior to the act of July 16, 1862, authorized those courts to exercise such powers in the enforcement of their interlocutory judgments or decrees or restricted the exercise of such powers to the enforcement of such as were final. The district court for the district of Wisconsin having adopted the former view, and having passed an order based upon that view, from which an appeal had been taken and a supersedeas bond given, this court held simply that such appeal superseded the order. The fact that the particular order appealed from was one directing a receiver to release a part of the property which was in his possession was simply an accidental circumstance, in no way entering into the consideration or disposition of the case, the point decided being that the lower court was without power to pass any order of any kind in the case under the act in

question, and that any order which it assumed to pass would be superseded by an appeal and appropriate bond.

That an appeal, though accompanied by a supersedeas bond, from an order vacating a receivership does not continue in office the receiver or preserve the fund in his hands, as has been stated, was directly decided by this court in Hovey *vs.* McDonald, 109 U. S., pp. 160–162, which decision has never since been either overruled or modified, rendering it unnecessary to cite decisions of the several State courts to like effect, of which decisions, however, *In re* Real Estate Associates, 58 Cal., 356; Swing *vs.* Dennis, 24 Ohio St., 1, are examples.

Ferguson *vs.* Dent, 29 Fed. Rep., 9, 10, cited by appellant, holds the rule as to the vacating of appeals and supersedeas bonds upon injunctions granted, denied, or dissolved, as laid down in the Slaughter-house cases, Hovey *vs.* McDonald, etc., applies equally to receivers, and that a supersedeas bond, though free from irregularity or defects, will not supersede the directions of the final decree concerning the receiver, be they what they may. In that case a bond intended to be a supersedeas having been defectively drawn and the court being applied to to enforce its decree discharging the receivers for that reason, it refused to do so upon the ground indicated in Hovey *vs.* McDonald, namely, that the matter of continuing or not continuing in force injunctions or receiverships pending an appeal is a matter resting within the discretion of the court, requiring its affirmative action, wholly independently of the existence or non-existence of a supersedeas bond, the function of the latter being only to supersede execution.

VI.

AFFIRMATIVE DEFENSES.

As will be seen upon examination of the opinion of the Court of Appeals, printed in the record, it was argued there on behalf of appellees that the appellant was concluded upon the questions sought to be raised by her bill in this cause by the litigation of certain questions in the former suit and the adjudication of them there, and that she was further precluded from maintaining her present suit by her laches in permitting the sale to go unquestioned for nearly seven years, and until property, which, as established by the record in this cause, had been well sold at $29,200, had enhanced in value until it was then worth, as alleged in the bill, nearly or quite $200,000, and worth now, according to her brief, not less than $150,000. These questions, however, of *res judicata* and laches, which the Court of Appeals thought it unnecessary to discuss, in view of its decision that the sale of March 26, 1884, was made pursuant to the purpose and intention of the court's decree of December 11, 1883, and was not a violation of the possession of the receiver or a contempt of court, will be very briefly considered here.

1.

RES JUDICATA.

The order for reference for an accounting and distribution of the funds in the hands of Keyser and in the registry of the court was made November 13, 1884, on the motion of the appellant's solicitor (Record, p. 124), six months after the sale. At the hearing before the auditor the deed from Tyler to Caldwell, the purchaser at the sale, was introduced in evidence and filed by her, through her solicitor (Record,

p. 329), without any intimation of objection to the sale. The litigation thereafter prosecuted by the appellant for nearly three years was over the question whether those moneys should be applied to the deficiency in the mortgage debt, which the proceeds of the foreclosure sale had been inadequate to pay, or should be received by her on the ground that the mortgagee was not entitled to the rents until lawfully put into possession of the mortgaged property. The former of these contentions was established by the opinion and decree of this court in the cause, in 123 U. S., at p. 306, in the language following:

"When it was afterwards adjudged that the first deed of trust thereby secured, which Keyser's original bill sought to enforce, had been released and discharged, and that the second deed of trust was valid as against Mrs. Hitz, and the sum obtained for the land *at a sale under the power contained in this deed* proved insufficient, by more than the whole of the fund in court, to pay the debt of Hitz to Jenks, secured by this deed, it was rightly held that Mrs. Hitz had no right as against Jenks to any part of this fund."

See, also, 4 Mackey, 179, 185.

This, we submit, is an adjudication necessarily involving the fact of sale. Indeed, the position and proposition contended for by the appellant herself before the general term and before this court in respect to these rents was a clear assertion by her in that case of the fact that there had been a sale and a submission to the court of rights claimed by her involved therein. As above pointed out, the very evidence of the fact of sale, namely, the deed from Tyler to Caldwell, was introduced into evidence and filed by her solicitor, and the rents and profits to the date of such sale were claimed by her on the ground that this sale for the first time placed Jenks in a position to claim any rents and profits of the property.

Her present position, that there never was any sale, is irreconcilably inconsistent with the position occupied by her

before the general term and before this court for nearly four years after the sale, and is inadmissible.

Davis *vs.* Wakelee, 156 U. S., 680, 690, 691, and citations.

Brooks *vs.* Laurent, 98 Fed. Rep., 647.

2.

LACHES.

Upon this question the facts are as follows:

The sale took place March 26, 1884, and was for the then full and liberal market value of the property. The complainant knew of the advertisement at least sixteen days before, as is shown by her letter to the trustee, at page 9 of the record, and she herself produced and filed with the auditor the evidence of the sale under the reference of November 13, 1884 (Record, p. 329). She neither then nor at any subsequent time prior to the filing of this bill November 6, 1890, questioned the regularity of the sale or the sufficiency of the price realized through it or dissatisfaction with it in any particular, but, on the contrary, as shown under the preceding head, made it in part the basis of the claims put forward by her from that time until the opinion of this court in November, 1887; nor when all the claims set up by her in the then pending suit had been conclusively and finally determined against her by that opinion did she then give any notice of dissatisfaction with the sale. The "boom" in G Street property had not then commenced (Stellwagen, Record, p. 196). It was not until 1890, when that unanticipated and remarkable rise in values had increased the worth of the property from about $30,000 to nearly $200,000, that the appellant manifested her first disposition to question the sale by the filing of this bill, which, as here presented, all the other grounds of relief being abandoned,

asks the court, upon a ground wholly barren of any colorable claim of equity, to compel the appellees to accept the then money value of the ground and allow her the exclusive benefit of its enhanced value, in spite of the fact, shown by the testimony, that the appellees or their ancestor could have purchased any one of a score or more of other properties upon either F or G street at the time and at a similar price, and which properties would today have been worth as much as that in controversy here.

Not only so, but she further requires the appellees to go into an accounting of all receipts and disbursements for the long intervening period, a part of them occurring in the lifetime of their ancestor, now deceased, and, in effect, to give her the benefit of the increased rentals during all the period of time in question, embarrassed as such an accounting presumptively must be through the loss or non-preservation of books, vouchers, and the like during a portion of the time at which neither the appellees nor their ancestor had any reason to suppose an accounting would ever be called for.

That an explanation of her delay was necessary under the well-settled rules of this court, the appellant well understood, and it must be presumed that she complied with this indispensable condition of a successful application to the court at this time to the fullest extent that she was able in the excuses given in her bill. These excuses (Record, p. 11), namely, that she had been engaged in such protracted and harassing litigation, accompanied by such an amount of expense that she had "been obliged to be very economical because of the embarrassed condition of her estate," are put in issue by the answer (Record, p. 25), which alleges that the complainant is possessed of large wealth; that the reasons assigned for the delay are neither true in fact nor sufficient in law, and that the real reason of the suit is the fact that an unexpected and unprecedented rise in real-

estate values in the locality of the property had commenced some two or three years prior to the filing of the bill.

As has already been pointed out, no serious attempt to prove that the delay was occasioned by the causes assigned, or that those causes, in fact, existed, is made in the evidence. Indeed, since a mere petition in the then pending cause, bringing to the court's attention the fact that the trustee was about to sell, notwithstanding the alleged existence of a receivership or a petition after the sale setting up the grounds of objection contained in her present bill, or an application to this court such as was made in Goddard *vs.* Ordway, was all that was necessary, and would have been accompanied with practically no expense, the insufficient character of the explanations offered is manifest. On the contrary, as also above stated, the appellant, by the character of the litigation thereafter prosecuted by her, gave the appellees the strongest evidence of her acquiescence of the sale and the absence of objection to it.

That such delay, with full knowledge of all the facts and protracted until there had been a most material change in values, is a bar to relief in a court of equity, is a rule too often illustrated in this court to require any extended citation of authorities.

Some citations are given in the opposing brief as supporting a claim that the analogy of the 20 years' statutory bar at law is applicable, and that, in a suit affecting real estate, the rule of laches will not preclude relief until the expiration of that period. Few, if any, of the authorities in question, it is believed, really involve the proposition contended for. If they do, however, they are at variance with the decisions of this court.

The same objection was made in Mackall *vs.* Casilear, reported in 137 U. S., at p. 556, but the court held a delay of 12 years fatal, although the controversy related to real estate, and it was a case in which, if the action had been at law, nothing short of 20 years would have constituted a bar.

So, in Miller *vs.* McIntire, 6 Pet., 61, the court declares:

"At all times courts of equity have upon general principles of their own, even where there was no statutory bar, refused relief to stale demands where the party has slept upon his right and acquiesced for a great length of time."

McKnight *vs.* Taylor, 1 How., 161, was an effort to reach real estate before expiration of the 20 years. The court said:

"If, indeed, the suit had been postponed a few months longer, 20 years would have expired, and, in that case, according to the whole current of authorities, the debts in the schedule would all have been presumed to be paid. But we do not found our judgment upon any presumption of payment, *for it is not merely on the presumption of payment, or in analogy to the statute of limitations, that a court of chancery refuses to lend its aid to stale demands.*"

In the case last cited the court continues:

"In matters of account, where they are *not* barred by the act of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice, when the original transactions have become obscured by time, and the evidence may be lost."

The only question of account, *or of fact*, presented in McKnight *vs.* Taylor was whether a debt of a fixed amount set out in the schedule accompanying a deed of trust remained unpaid. As will be seen, it was very much simpler than an investigation into the rent accounts of a building like that involved in the case at bar, accommodating numerous tenants and involving the production of vouchers for repairs, insurance charges, and the like.

In Godden *vs.* Kimmell, 99 U. S., 201, where the delay had been six years less than the statutory period, the court, in applying the rule, said:

"Questions have arisen in controversies of the kind in question in getting at the truth so as to administer justice with anything like reasonable certainty. That the parties to the original transaction have long since deceased is shown from the proofs in the cause, and it is not improbable that many or all of their clerks or agents may be inaccessible as witnesses, for the same or other reasons, or if living and their attendance as witnesses may be secured, they may not be able to remember anything about the transaction."

"The counsel for the complainants have argued that a court of equity can never give effect to a lapse of time, except in a case where the statute would bar an action at law. * * * But there are many cases in which lapse of time will constitute a bar in equity, though at law the statute would not bar. * * * Where the statute applies, it is binding on a court of equity, but in cases where the statutes do not apply, the court acts upon its own principles" (Lewis *vs.* Baird, 3 McL., pp. 82, 83).

In Brown *vs.* County of Buena Vista, 95 U. S., 157, the court found the statute of limitations of Iowa, where the case originated, inapplicable, but added:

"A court of equity applies the rules of laches according to its own ideas of right and justice. Every case is governed chiefly by its own circumstances. Whether the time the negligence has subsisted is sufficient to make it effectual is a question to be resolved by the sound discretion of the court (*Sullivan vs. Portland and Kennebec Railroad Co.*, 94 U. S., 806)."

So, in Harwood *vs.* Railroad Co., 17 Wall., 78, which was a suit to set aside a foreclosure sale for $25,000 of a railroad property worth $2,000,000, filed nearly five years after the sale, and alleging it to have been procured by collusion and in fraud of the stockholders, the court said:

"We are of opinion, also, that there has been too great delay in initiating this suit, and that no sufficient excuse is given for it. The sale was made 5 years before the commencement of this suit, and it is fairly to be inferred from the bill that the plaintiffs were aware of the proceedings as

they progressed. Their knowledge of the mortgage sale is admitted. The allegation of ignorance is, in general terms, of the fraudulent acts and arrangements. * * * Without reference to any statute of limitations, the courts have adopted the principle that the delay which will defeat the recovery must depend upon the particular circumstances of each case."

In the case at bar the fact that the appellant was aware at the time of all the proceedings and of every fact which she alleges in her bill, except the subsequent increase in value, is not left to fair inference, but is apparent and undisputed.

"Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them" (Speidel *vs.* Henrici, 120 U. S., p. 387).

In Hayward *vs.* National Bank, 96 U. S., 611, a delay of less than four years to redeem valuable stocks sold by a bank, which held them as collateral, to three of its own directors, at private sale, the court said:

"Courts of equity often treat a lapse of time less than that prescribed by the statute of limitations as a presumptive bar, on the ground of 'discouraging stale claims, or gross laches, or unexplained acquiescence in the assertion of an adverse right.' * * * No sufficient reason is given for the delay in suing. His poverty or pecuniary embarrassment was not a sufficient excuse for postponing the assertion of his rights. He must be deemed to have made a final election not to disturb the sale of 1868; and a court of equity should not permit him, under the circumstances, to recall that election. Upon the grounds, then, both of acquiescence and lapse of time, he should be held to have forfeited all right to relief in a court of equity."

The "circumstances" referred to, in the above extract from the opinion, consisted merely of a large advance in the value of the stock. There had been no death of any party

in interest, no questions of accounting were involved, and the poverty or pecuniary embarrassment of the plaintiff seems not to have been disputed. In the case at bar we have stronger grounds for applying the rule, as there is absolutely nothing proven or attempted to be proved in the way of excuse or explanation.

"Length of time necessarily obscures all human evidence, and deprives the party of the means of ascertaining the nature of original transactions. * * * Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but *by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor.*"

Wagner *vs.* Baird, 7 How., 258.

No hindrance, impediment, fraud or concealment of any kind existed in the case at bar.

In Murphy *vs.* Paynter, 1 Dill., 333, to set aside a deed obtained by duress 12 years before, the property remaining in the same grantee, and continued apprehension of personal injury being the cause assigned for delay, the court held the action barred by laches, although declaring that the complainant would probably have been entitled to the relief sought if applied for within a reasonably early period.

It is no answer to this overwhelming weight of authority to cite cases, accompanied by fraud, concealment, or the like, in which relief has been granted after great intervals of time. Such cases furnish no analogy to others in which there was no fraud, concealment, or ignorance.

For a case applying the rule where, as in the case at bar, there had been such changes in value as that to place the parties where they originally were would involve want of equity and injustice to one of them, and presenting an admirable summary of analogous cases in this court, reference

is made to the opinion in Galliher *vs.* Caldwell, 145 U. S., 371–373. The court concludes:

"But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

There are, doubtless, innumerable mortgagors, and vendors as well, of property on G and other streets in the city of Washington and elsewhere, the value of which has greatly enhanced since the divestiture of their titles, who would gladly "ask the privilege of redeeming the property by paying the full amount of the debt secured" or of the purchase-money received; and, we submit, there are few who could do so upon grounds more wanting in any substantial equity than that which the appellant presents in this court.

Reespectfully submitted,

W. D. Davidge, Jr.,
J. J. Darlington,
Solicitors for Appellees.

Supreme Court of the United States.

No. 99.—October Term, 1901.

Jane C. Hitz, Appellant,
vs.
John Story Jenks, William Henry Jenks, Rachel Jenks Randolph, Sarah L. Crane, and Richard W. Tyler.

Appeal from the Court of Appeals of the District of Columbia.

[April 7th 1902.]

Mr. Justice Harlan delivered the opinion of the Court.

The property involved in this suit is certain improved real estate on the northeast corner of Ninth and G streets in the city of Washington, of which the appellant, who was the plaintiff below, asserts ownership subject to the lien created by a deed of trust to which reference will be presently made; but of which property the heirs at law and devisees of the late William P. Jenks also assert ownership in virtue of a conveyance to him by the purchaser at a sale had under that deed by the trustee therein named while he held the property as receiver—such purchase having been in fact for the benefit of Jenks in whose favor the deed of trust was executed.

This land had been inherited by Mrs. Hitz from her father after her marriage to John Hitz in 1856. There were several children of that marriage, and, as stated by the Court of Appeals, the husband became entitled to an inchoate tenancy by the curtesy in the wife's estate which remained unaffected by the married woman's act of 1869.

The controlling question presented on this appeal is whether the sale under the deed of trust stands in the way of the redemption of the property by Mrs. Hitz upon her paying the debt secured by the above deed of trust.

The facts necessary to be stated in order to bring out clearly the views of the respective parties touching that question are as follows:

By a deed of trust dated January 26th 1876, John Hitz and his wife Jane C. Hitz conveyed this real estate to R. B. Donaldson and Charles E. Prentiss, trustees, to secure the payment of two promissory notes of $10,000 each executed January 5th 1876 by William R. Chipley to E. P. Halstead and by the latter endorsed to the German-American Savings Bank.

Subsequently the above notes passed to and became the property of the German-American National Bank, which succeeded the German-American Savings Bank.

On the 16th day of June 1877 (the deed to Donaldson and Prentiss having been released of record) Hitz and wife by deed conveyed the property to Sarah L. Crane, who on June 18th 1877 conveyed to Richard W. Tyler as trustee, to secure the payment of a promissory note for $20,000 executed by the grantor and made payable to John Hitz or order three years after date, with interest at the rate of eight per cent per annum until paid; which note was endorsed by the payee to William P. Jenks. Sarah L. Crane had no interest in the transaction with Jenks—the real consideration for the note being a loan of money by Jenks to the German-American National Bank, of which John Hitz was President and Charles E. Prentiss, a brother of Sarah L. Crane, was Cashier. The title was put in her name in order that she might execute the above note to Jenks and make a deed of trust to secure its payment, which should be a first lien on the property.

The deed to Tyler as trustee authorized him upon default in the payment of the note or any quarterly instalment of interest thereon at the rate aforesaid, or of any sums advanced for taxes and insurance when demanded, or of any cost, charge or commission, to sell the land and premises, or as much thereof as might be necessary, at public auction to the highest bidder, upon such terms and at such time and place as the trustee deemed best for the interest of the parties concerned.

In October 1878 the German-American National Bank failed, and by appointment of the Comptroller of the Currency, Benjamin U. Keyser, became its receiver. The latter (having first procured from Sarah L. Crane a conveyance of such interest as she had after satisfying the deed of trust to Tyler) obtained possession of the property from Hitz, and proceeded, in his capacity as receiver of the bank, to collect the rents.

Default having occurred in the payment of taxes and interest on the Jenks note, Tyler as trustee gave notice by publication in a newspaper that he would sell the property at public auction, on the 20th day of January 1879.

Thereupon, on the 10th day of January 1879, Keyser as receiver commenced his suit in equity in the Supreme Court of the District of Columbia against John Hitz, Jane C. Hitz, Sarah L. Crane, William P. Jenks, Richard W. Tyler, E. P. Halstead, R. P. Donaldson, Charles E. Prentiss and William R. Chipley. Part of the relief asked was that pending the cause the defendants Jenks and Tyler and each of them be restrained from advertising and selling the property in question or in any manner interfering with it.

On the 21st of February 1879 an order was entered restraining the sale by Tyler.

All of the defendants filed answers—Jenks and Tyler resisting the relief asked. Sarah L. Crane by cross-bill asked that the conveyance from her

to Keyser be vacated. Mrs. Hitz by cross-bill *claimed the property as hers*, and prayed, upon various grounds, *for the cancellation of the deed to Sarah L. Crane, as well as the deed of the latter to Tyler*, and for an accounting in respect of rents and profits. She also charged that there had been *a fraudulent alteration of the deed from her to Sarah L. Crane.* Answers to the various cross-bills were also filed.

The cause having been heard at special term the court, on the 28th of November 1881, rendered a decree adjudging that the two Chipley notes of $10,000 each had been paid; that the deed of release by Donaldson and Prentiss was a valid instrument; that the deed by Hitz and wife to Crane was null and void as to Mrs. Hitz; that the deed to Tyler, trustee, was valid as to any interest in the property which John Hitz had in virtue of his marital relation, but was null and void as to Mrs. Hitz; and that the deed to Keyser, as receiver, was null and void from its delivery.

That decree also provided that Keyser, receiver, be directed to account to the court for whatever sums of money he might have collected arising out of the property in question after the same came into his possession, and that he immediately surrender possession "to Richard W. Tyler, *who is hereby appointed receiver*, to take possession of and rent and manage the same and to collect the rents and profits thereof and apply the same, so far as may be necessary, to the payment of taxes, insurance and other expenses needed to keep the said property in tenantable condition until the further order of the court."

Keyser, Mrs. Hitz and Jenks severally appealed to the General Term and their appeals were allowed.

On the 5th day of December 1881 Tyler gave a bond as receiver of the court in the penalty of five thousand dollars. But he did not take immediate possession.

On the 15th day of December 1881 an order was made at Special Term that Keyser bring the rents and profits of the property accruing after December 1st 1881 from month to month into court, and give bond as receiver of the German-American National Bank in the penalty of five thousand dollars, and the execution of the decree so far as it transferred the property to the receiver therein named was stayed until final decision. Keyser executed, December 16th 1881, the required bond.

On the 11th day of December 1883 the General Term, upon final hearing, rendered a decree in which among other things it was stated that the court was of opinion "that the complainant, Benjamin U. Keyser, receiver, as the holder of the notes made by William R. Chipley, is not entitled to any relief, and that the deed of conveyance, dated the 16th of June 1877, made by Jane C. Hitz and John Hitz to Sarah L. Crane, in fee simple, conveyed as well the right, title, interest and estate of the said Jane C. Hitz

as of the said John Hitz in and to the real estate and premises in said deed mentioned and referred to, and that there is no equity shown in this cause to prevent or delay the execution [or] enforcement of the deed of trust dated the 18th day of June 1877, whereby the said Sarah L. Crane conveyed the said real estate and premises to Richard W. Tyler in trust to secure the payment of the debt to William P. Jenks, with interest and costs, as in and by the said deed of trust mentioned and provided." It was therefore adjudged that "the injunction granted on the 21st of February 1879, enjoining the sale by the said Richard W. Tyler of the said real estate and premises conveyed to him in trust, [be,] and the same is hereby, dissolved, and that the decree in special term, so far as the same holds that the said deed of conveyance from Jane C. Hitz and John Hitz did not convey the right, title, interest and estate of the said Jane C. Hitz in and to the said real estate and premises, and so far as the same retains the said injunction in respect of such right, title, interest and estate of the said Jane C. Hitz, be, and the same is hereby, reversed."

The court adjudged that the deed from Crane to Keyser was void; and directed that Keyser, as receiver, account for the rents and profits received or which should have been received by him before and after the decree in Special Term, the cause to be retained for the purposes of such accounting.

The decree of the General Term also provided:

"Fourth. That the order passed in special term on the 15th of December 1881, authorizing the collection of said rents and profits by the complainant, be, and the same is hereby, revoked, and that the said Richard W. Tyler be, and he is hereby, appointed *receiver*, with power, *until a sale shall be made under the said deed of trust*, to take and hold possession of said real estate and premises and to rent and manage the same, and to collect the rents and profits and apply the same to the payments of the taxes, insurance and any proper expenses, and it shall be the duty of the said receiver, after such application, to pay from time to time the said rents and profits into court and from time to time to make report to the court of the manner in which he has discharged his trust, and before entering upon the performance of his office as receiver the said Richard W. Tyler shall give bond in the penal sum of five thousand dollars and with a surety or sureties to be approved by this court or one of the justices thereof, conditioned for the faithful discharge of the trust hereby reposed in him."

"Seventh. That this decree is without prejudice to the right of any party entitled to the reversion of the said real estate and premises, or any interest in such reversion, to redeem or to make claim, as such party may be advised, to any balance or portion thereof which, upon a sale under the said deed of trust and the satisfaction of the debt secured thereby, with interest and costs, and of the expenses of sale, may remain in the hands of the trustee.

"Eighth. That, save so far as this cause is retained, as above mentioned and decreed, the bill of the complainant, with the amendment and supplement thereto, and the cross-bill of Jane C. Hitz, with the amendment thereto, be, and the same are hereby, dismissed."

Mrs. Hitz appealed from the above decree to this court. The appeal was allowed, and such allowance was recited in the decree. On December 31st 1883 Mrs. Hitz executed and the court approved a *supersedeas* bond in the penalty of $3,000.

In January 1884 Keyser, in conformity with the decree of the General Term, surrendered possession of the property to Tyler, who thereafter held it *as receiver* appointed by the court. But notwithstanding the allowance of Mrs. Hitz's appeal, and the approval of the *supersedeas* bond executed by her, Tyler, upon his own motion or by direction of Jenks, and in his capacity only *as trustee* under the Crane deed, published, on March 3d 1884, a notice in a newspaper that he would, on the 26th day of March 1884, sell *for cash* the property in question, together with the improvements thereon, by virtue of the deed of trust executed to him June 18th 1877. The notice did not mention the fact that the property was in Tyler's hands as receiver appointed by the court. But he was immediately notified in writing by the attorney of Mrs. Hitz of the fact that she had executed, and that the court in December 1883 had approved, her *supersedeas* bond. Tyler ignored that notice and sold the property at public auction on the day named to one Seth Caldwell for the sum of $29,200—the latter, it is conceded, making the purchase *in behalf of Jenks*. On the next day Tyler executed a conveyance to Caldwell, who on April 9th 1884 conveyed to Jenks. The proceeds of the sale lacked upwards of four thousand dollars of discharging the debt due to Jenks.

It should be stated that after the cause was removed to this court by appeal an accounting was had below as to the rents and profits collected or which should have been collected by Tyler as receiver; and on July 13th 1885 a claim of Mrs. Hitz was disallowed, and the money in the registry of the court was ordered to be paid to Tyler to be applied by him in discharge of taxes and assessments accruing prior to January 1st 1884. From that order Mrs. Hitz also appealed and executed a bond for costs.

The two appeals were heard in this court, and each decree or order appealed from was affirmed November 14th 1887. *Hitz* v. *Jenks*, 123 *U. S.* 297. Pending the cause here William P. Jenks died, and, the record states, John Story Jenks, William Henry Jenks and Evan Randolph, executors, were made appellees.

The present suit was brought by Mrs. Hitz on the 6th day of November 1890—the defendants being the sole heirs at law and devisees of Jenks, and Richard W. Tyler, Sarah L. Crane and Enoch Totten. Its object was to

have the sale to Caldwell and the conveyance by him to Jenks set aside and annulled. It is not necessary, in view of the grounds upon which we will dispose of the cause, to set forth all the allegations of the bill. It is sufficient to say that it asked that the sale be set aside for the following reasons:

"1. The property was in the possession and custody of a receiver appointed by the court to take and keep possession thereof and to collect the rents, and an approved *supersedeas* bond in due form of law had been given on her appeal to the Supreme Court of the United States from the decree of the General Term, and all proceedings were stopped, and no action could be legally taken under said decree while said appeal remained pending.

"2. Said sale was void because the terms of sale were unreasonable; because there were no bids, the bidders there, if any, having been discouraged from bidding; because the pretended sale was made pending an appeal in the cause to the Supreme Court of the United States; because it was given out, stated, and understood at the time of sale that it was intended to make the sale in the face of said appeal for the purpose only of transferring the title to the creditors; because the price bid and accepted at said sale was so grossly inadequate as to amount to a fraud upon the complainant, and because said pretended sale was conceived and carried through solely in the interest of the creditor, and in total disregard and in violation of the rights of the complainant as the owner of the equity of redemption. She therefore submits to the court that said pretended sale should be set aside, and that she ought to be allowed to redeem said property. She is willing and hereby offers to pay for the said heirs at law of said Jenks whatsoever sum may be found justly due to them for principal and interest on the said loan, and also for all expenditures in and upon said property, after charging them with the rents actually received, a fair accounting to be had under the direction of this court to ascertain the true balance due."

The relief prayed for was that the plaintiff be decreed to be the owner of the above property, *subject to the debt* to secure the payment of which the deed to Tyler as trustee was given; that the deed from Tyler to Caldwell be declared void, and that she be allowed to redeem the property *by paying to the heirs of Jenks what might be found due upon a proper accounting in reference to the property*; that Tyler be held chargeable, as receiver, and that he be compelled to account for the rents that had been or should have been collected by him; that the heirs of Jenks be restrained from selling or encumbering the property; that a receiver be appointed to take charge of it and to collect the rents; and that the plaintiff might have such other and further relief as was just and equitable.

The answers were such as to meet all the material issues made by the bill. Upon final hearing the bill was dismissed with costs, and that decree was affirmed in the Court of Appeals of the District.

We have seen that the relief asked by Mrs. Hitz in her cross-bill in the original suit was a decree declaring that the deed to Donaldson and Prentiss, the deed from herself and husband to Sarah L. Crane, the deed from the latter to Tyler as trustee, and the deed from Sarah L. Crane to Keyser, as receiver, were null and void as to her. She asked to be put in possession of the property and that it might be conveyed to trustees for her sole and separate benefit, so that it could not be interfered with by her husband or his creditors. We have also seen that the Special Term declared void as to Mrs. Hitz the deed to Sarah L. Crane, as well as the deed to Tyler, trustee, and the deed to Keyser as receiver. The General Term reversed that decree, dissolved the injunction restraining Tyler from selling the property under the trust deed and dismissed the suit. But Mrs. Hitz appealed to this court, and the decree of the General Term reciting the allowance of her appeal was superseded.

It is now said that the appeal from the Special to the General Term in the Keyser case was only a step in the progress of the cause during its pendency in the same court, and that the decree of the General Term took the place of the decree and orders in the Special Term and was the final decision in the cause; consequently, it is argued, an appeal to this court from the decree of the General Term, with *supersedeas*, could not have the effect to reinstate or revive the decree of the Special Term, particularly that part of it enjoining Tyler from selling under the trust deed. Treating the decree of the General Term as the final decision in the original suit, and the only one that could have been reviewed on the appeal in that cause to this court, it is further contended that such decree, although appealed from, was not in law superseded, *so far as it dissolved the injunction*—no special order having been made by the General Term or by this court staying the execution of that part of the decree pending the cause here. In other words—and such was the holding of the Court of Appeals—the force of the decree dissolving the injunction was not at all affected by the appeal with *supersedeas*.

In the view we take of the case, it is unnecessary to discuss these questions, and it may be assumed for the purposes of the present examination that the positions just referred to are correct. But does it follow that the decree of the General Term in the Keyser case was not superseded so far as it ordered the dismissal of Mrs. Hitz's cross-bill with costs, and declared that she was not entitled to have the deed of her husband and herself to Sarah L. Crane, as well as the deed to Tyler, trustee, annulled and set aside, so far as her interests in the property were concerned? We think not. The

mere dissolution of the injunction did not conclusively determine the merits of the cause as disclosed by the pleadings. Notwithstanding such dissolution, the way was open for Mrs. Hitz, by her appeal in the original cause, to obtain a decision by this court as to the validity of the deed from herself and husband to Crane and of the deed from Crane to Tyler, trustee. If this court had adjudged, upon that appeal, that those deeds were void as to Mrs. Hitz, and had remanded the cause for further proceedings, can it be doubted that the court below could have granted the relief asked in her cross-bill by setting aside not only the above deeds, but the sale made by Tyler as trustee under the deed from Crane to him? If the order dissolving the injunction was not affected by the appeal with *supersedeas*, and if a stranger to the suit had purchased the property at the sale by Tyler pending the Keyser case here, a different question would have been presented. But all difficulty on that ground is avoided by the fact that the purchase was in fact by the agent and representative of Jenks and for his benefit. As between the plaintiff and Jenks, the title to the property was bound from the filing of the bill. By the pleadings in the cause the parties had joined issue as to the validity of the deed to Tyler, trustee, and as to the right of Jenks to have the property sold under that deed. Jenks and Tyler, being parties to the cause, could not avoid the final determination of that issue in this court by any direction from the former to Tyler to sell the property under the deed of trust and by becoming the purchaser through an agent.

We have made these observations for the purpose of showing that the mere dissolution of the injunction by the General Term, and the subsequent sale at public auction under the trust deed, by Tyler—whether acting upon his own motion or by direction of Jenks is immaterial—do not preclude an inquiry in the present suit as to the validity of the sale made by Tyler in his capacity as trustee, pending the Keyser cause here upon appeal by Mrs. Hitz with *supersedeas*. This question will now be examined.

Tyler, as trustee under the Crane deed, advertised and sold the property, while in his possession as receiver appointed by the court. This was done by him after the removal of the cause to this court, and without any special order of court allowing him to take that course. As receiver, he held the property for the court and for the benefit of all the parties asserting an interest in it, including Mrs. Hitz. While in his hands as receiver the property was in the custody of the law. As a party to the cause he, as well as Jenks, whom he represented as trustee, knew that Mrs. Hitz by her cross-bill sought to have the deed under which he proceeded set aside as void. What he did as trustee tended to defeat the rendition here of any effective decree in favor of Mrs. Hitz, even if this court, upon her appeal, had directed such a decree to be entered. That this court affirmed the decree appealed from did not change the fact that the title to property

in the custody of the law, by a receiver, was attempted to be changed by that receiver, acting without special leave of court and under a private deed of trust, the validity of which was in issue in the very case in which the receiver was appointed. If this court had decided that Mrs. Hitz was entitled on her cross-bill to have the deed made by herself and husband to Crane, and the deed by the latter to Tyler, set aside, and had remanded the cause with directions to enter a decree to that effect, the court below would have been confronted with the fact that its own receiver, in his capacity as private trustee and without leave or direction to that end, had sold the property at public auction for cash to the party in whose interest he had been made trustee, and who was the principal adversary of Mrs. Hitz, one of the parties for whom he held possession as receiver. Let us look at some of the authorities on this general subject.

In *Wiswall* v. *Sampson*, 14 *How.* 52, 65, it was said: "When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. This was held in *Angel* v. *Smith*, 9 *Ves.* 335, both with respect to receivers and sequestrators. When, therefore, a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment, or to permit him to be examined *pro interesse suo.* 1 *J. & W.* 176, *Brooks* v. *Greathed;* 3 *Daniel's Pr.* 1984. And the doctrine that a receiver is not to be disturbed, extends even to cases in which he has been appointed expressly without prejudice to the rights of persons having prior legal or equitable interests. And the individuals having such prior interests must, if they desire to avail themselves of them, apply to the court either for liberty to bring ejectment, or to be examined *pro interesse suo;* and this, though their right to the possession is clear. 1 *Cox*, 422; 6 *Ves.* 287. The proper course to be pursued, says Mr. Daniel, in his valuable treatise on Pleading and Practice in Chancery, by any person who claims title to an estate or other property sequestered, whether by mortgage or judgment, lease or otherwise, or who has a title paramount to the sequestration, is to apply to the court to direct the plaintiff to exhibit interrogatories before one of the masters, in order that the party applying may be examined as to his title to the estate. An examination of this sort is called an examination *pro interesse suo*, and an order for such examination may be obtained by a party interested, as well where the property consists of goods and chattels, or personalty, as where it is real estate. And in the mode of proceeding is the same in the case of the receiver. 6 *Ves.* 287; 9 *Id.* 336; 1 *J. & W.* 178; 3 *Daniel's Pr.* 1984."

Again: "The settled rule also appears to be that where the subject-matter of the suit in equity is real estate, and which is taken into the possession of the court pending the litigation, by the appointment of a receiver, or by

sequestration, *the title is bound from the filing of the bill;* and *any* purchaser, *pendente lite,* even if for a valuable consideration, comes in at his peril. 3 *Swanst.* 278, *n.* 298; 2 *Daniel's Pr.* 1267; 6 *Ves.* 287; 9 *Id.* 336; 1 *J. & W.* 178; *Daniel's Pr.* 1984."

It was contended in that case that a sale of the premises on execution and purchase occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court, and that the sale therefore, in such a case, should be upheld. But this court—in words that are strikingly applicable in the present case—thus disposed of that contention: "Conceding [that] the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. *The property is a fund in court, to abide the event of the litigation,* and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And, in order to effect this, the court must administer it independently of any rights acquired *by third persons, pending the litigation. Otherwise, the whole fund may have passed out of his hands before the final decree, and the litigation become fruitless.* It is true, in administering the fund, the court will take care that the rights of prior liens or encumbrances shall not be destroyed; and will adopt the proper measures, by reference to the master or otherwise, to ascertain them, and bring them before it. Unless the court be permitted to retain the possession of the fund, thus to administer it, how can it ascertain the interest in the same to which the prosecuting judgment creditor is entitled, and apply it upon his demand? . . But it is not necessary to go this length in the case before us, as it is sufficient to say, that the *sale* under the judgment, *pending the equity suit,* and *while the court was in possession of the estate, without the leave of the court,* was *illegal and void.* We do not doubt but that it would be competent for the court, in case the judgment creditor holding the prior lien had not come in and claimed his interest in the equity suit, to decree a sale in the final disposition of the fund subject to his judgment. The purchaser would then be bound to pay it off. But this disposition of the legal prior encumbrance is a very different matter, and comes to a very different result from that of permitting the enforcement of it, *pendente lite,* without the leave of the court. The rights of the several claimants to the state or fund is then settled, and the purchase under the decree can be made with a full knowledge of the condition of the title, or charges to which it may be subject."

So, in *Heidritter* v. *Elizabeth Oilcloth Co.,* 112 *U. S.* 294, which was the case of a sale of property under process from a State court while it was in the actual possession of a District Court of the United States. When the

sale took place the property *had passed out of the possession of the Federal court*, and there was no actual disturbance of such possession. Nevertheless this court held the sale to be void, under the doctrine of *Wiswell* v. *Sampson*, saying: "The same conclusion must prevail here; for, although the sale under the judgments in the State court was not made until after the property had passed from the possession of the District Court by delivery to the purchaser at the sale under the decree yet the initial step on which the sheriff's sale depended—*the commencement of the proceedings to enforce the mechanics' lien*, asserting the jurisdiction and control of the State court over the property sold—took place when that property was in the exclusive custody and control of the District Court; and by reason of its prosecution to a sale, was an invasion of the jurisdiction of that court. No stress is laid on the fact that notice of the proceeding, by affixing a copy of the summons upon the building, which was required by the statute, could only be made by an actual entry by the sheriff upon the property, to that extent disturbing the possession of the marshal, because the same result, in our opinion, would have followed if no such notice had been required or given. The substantial violation of the jurisdiction of the District Court consisted in the control over the property in its possession, assumed and asserted, in commencing the proceedings to enforce against it the lien claimed by the plaintiffs in those actions, prosecuting them to judgment and consummating them by a sale. The principle applied as in *Wiswall* v. *Sampon*, *ubi supra*, must be regarded as firmly established in the decisions of this court. It has been often approved and confirmed. *Peale* v. *Phipps*, 15 *How.* 367; *Hagan* v. *Lucas*, 10 *Pet.* 400; *Williams* v. *Benedict*, 8 *How.* 107; *Pulliam* v. *Osborne*, 17 *How.* 471; *Taylor* v. *Carryl*, 20 *How.* 583; *Yonley* v. *Lavender*, 21 *Wall.* 276; *Peoples' Bank* v. *Calhoun*, 102 *U. S.* 256; *Barton* v. *Barbour*, 104 *U. S.* 126; *Covell* v. *Heyman*, 111 *U. S.* 176."

We are not aware of any decision of this court modifying the rule laid down in these cases.

To the same effect are *Walling* v. *Miller*, 108 *N. Y.* 173; *Porter* v. *Kingman*, 126 *Mass.* 141; *Dugger* v. *Collins*, 69 *Ala.* 324; *Thompson* v. *McCleary*, 159 *Pa. St.* 191; *Ellis* v. *Water Co.*, 86 *Tex.* 109; *High on Receivers*, *3d ed.* 141; *Kerr on Receivers*, *2d ed.* 177.

In view of what has been said in the adjudged cases, it is clear that *as between the parties to the original cause* the title to the real estate in question was bound from the filing of the cross-bill of Mrs. Hitz; and that her appeal, with *supersedeas*, from the decree of the General Term preserved her right to have this court determine the whole cause upon the merits, as from the commencement of her suit and as between her and the parties hostile to her claim. It is also clear, under the authorities, that if Tyler while holding as receiver had, in a separate suit against Sarah

L. Crane, obtained a decree for its sale under the deed of trust, no title would have been acquired by the purchaser at such a sale. Still less could any title be acquired under a sale at public auction by Tyler, acting in his capacity as private trustee—the property being at the time in his possession as receiver in another cause *to which he was a party*, and which had, at the time, been removed to this court by appeal with *supersedeas*. As receiver he held the property for Mrs. Hitz as well as for Jenks, and he could not throw off the responsibility attaching to him in that capacity, and act, pending the appeal, simply as a private trustee under the deed from Sarah L. Crane.

But it is said that the decree of the General Term must be construed as authorizing Tyler as trustee, in his discretion, to sell the property while in his possession as receiver after the appeal from that decree by Mrs. Hitz had been perfected and a *supersedeas* bond executed and approved. A complete answer to this suggestion is that Tyler sought no such relief at the hands of the court. He asked no affirmative relief. He only desired that the court should not restrain him by injunction from acting under the deed of trust.

The words in the decree, "and he [Tyler] is hereby appointed receiver with power, *until a sale shall be made under the said deed of trust*, to take and hold possession of said real estate and premises, and to rent and manage the same, and to collect the rents and profits and apply the same to the payment of taxes, insurance and any proper expenses" did not confer any direct authority on Tyler, as trustee, to sell the property.

The court, having recited in the decree the allowance to Mrs. Hitz of an appeal, knew that such allowance removed the whole cause to this court, (*Ridings* v. *Johnson*, 128 *U. S.* 212, 218; *United States* v. *Rio Grande Dam and Irrigation Co.*, 184 *U. S.* —), and that this court could determine, at least *as between the parties*, whether the deed of trust to Tyler was a valid instrument so far as it affected the rights of Mrs. Hitz. It knew that one of the questions to be determined upon her appeal was as to Tyler's right to proceed under that deed. We should not, therefore, interpret the words referred to as intended to authorize, much less direct, Tyler, the receiver for all the parties and the representative of the court, to proceed in his private capacity as trustee for one of the parties to sell the property outright without any special order or direction to that effect. Neither Tyler nor Jenks, by their pleadings, asked for any such direction or authority from the court. The words "until a sale shall be made under said deed of trust," reasonably interpreted, meant no more than that the *power* of Tyler as receiver to take and hold possession of the property, *for the purposes designated*, should continue until there had been such a sale under the deed of trust as could properly and legally be made, and such as would give the purchaser a good title. By dissolving the injunction—

which was a matter of judicial discretion—the court, in effect, declared nothing more than that it would not, by injunction, restrain the trustee from doing what he might rightfully do under the deed to him. It did not, we must assume, intend to direct or authorize a sale by the trustee, whereby the right of Mrs. Hitz to have a final determination, upon her appeal in the original cause, as to the binding force, as between the parties, of the deeds purporting to pass her interest in the property, would be overreached or defeated.

Other questions were discussed at the bar, but they do not require to be specially noticed.

In our judgment it must be held: 1. That the deeds which Mrs. Hitz sought by her cross-bill to have set aside are to be deemed valid and enforceable instruments, it having been so adjudged in *Hitz* v. *Jenks*, 123 *U. S.* 297. 2. That the sale by Tyler as trustee, on the 26th day of March 1884, while holding possession of the property as receiver, and when the suit to which he was a party was pending here upon appeal with *supersedeas*, conferred no title upon Jenks as against Mrs. Hitz. 3. That as no sale has been made under the deed from Sarah L. Crane to Tyler, trustee, which would bind Mrs. Hitz, she is entitled in this suit to redeem the property by paying such sum as may be due on account of the debt to secure which that deed was executed—that sum to be ascertained by an accounting in the court of original jurisdiction, and the amount of all rents collected and all sums expended in the preservation or protection of the property to be taken into consideration.

It results that the decree of the Supreme Court of the District of Columbia dismissing the bill in the present suit, and the decree of the Court of Appeals affirming that decree, were both erroneous.

The decree of the Court of Appeals of the District is reversed, and the cause remanded to that court, with directions to reverse the decree of the Supreme Court of the District, and for such further orders in each court as will be in conformity with the principles of this opinion.

Reversed.

Mr. Justice BREWER dissented.

True copy.

Test:

Clerk Supreme Court, U. S.